Supreme Court, U.S.
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No. ____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

EXPORTADORA DE SAL, S.A. DE C.V., *Petitioner*,

v.

HIROKO SUGIMOTO, et al., *Respondents*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

Order Denying Petition For Rehearing
Court of Appeals
August 2, 1994

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HIROKO SUGIMOTO; KIMIKO KODANI; MAYUMI NUKIWA; ERI OMACHI; KUNIKO OMACHI,	)	No. 93-55716
	)	DC No. CV-88-01532-JMF
Plaintiff-Appellees,	)	ORDER
	)	Filed: August 2, 1994
vs.	)	
EXPORTADORA DE SAL, S.A. DE C.V.,	)	
Defendant-Appellant.	)	

Before: TANG, PREGERSON and NOONAN, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

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APPENDIX B

Opinion
Court Of Appeals
March 25, 1994

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HIROKO SUGIMOTO; KIMIKO KODANI; MAYUMI NUKIWA; ERI OMACHI; KUNIKO OMACHI, *Plaintiffs-Appellees,* v. EXPORTADORA DE SAL, S.A. DE C.V., *Defendant-Appellant.*	No. 93-55716 D.C. No. CV-88-01532-JMF OPINION

On Appeal from the United States District Court
for the Southern District of California
James M. Fitzgerald, District Judge, Presiding

Argued and Submitted
February 1, 1994—Pasadena, California

Filed March 25, 1994

Before: Thomas Tang, Harry Pregerson and
John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Noonan

SUMMARY

Torts/Negligence/Aviation

The court of appeals affirmed a district court judgment. The court held that under California law, a defendant was liable for the negligence of an independent contractor whom it hired to fly three visitors from its company town.

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Appellant Exportadora De Sal, S.A. De C.V. manufactures salt in a company town in Guerrero Negro, Mexico. An employee of Mitsubishi Corporation of Japan, which owns 49 percent of Exportadora, asked Exportadora to provide transportation for Hideo Omachi to Guerrero Negro by car and company plane. Mitsubishi pointed out to Exportadora that Omachi was a manager for one of Exportadora's most important Japanese customers. Exportadora's van transported Omachi from San Diego to Tijuana. Omachi was transported by company plane to Guerrero Negro.

Mitsubishi also asked Exportadora to arrange for transportation to Guerrero Negro for Katsuo Sugimoto and Yoshihito Kodani, professors who were interested in an agricultural project at Guerrero Negro. A representative of Exportadora met Sugimoto and Kodani in San Diego, and had them transported to the Tijuana airport, from which they flew in a company plane to Guerrero Negro.

In Guerrero Negro, Omachi, Sugimoto and Kodani were fed in Exportadora's company dining room, and housed at Exportadora's guest quarters. Because the company plane was not available on the scheduled date to return Omachi, Sugimoto and Kodani to Tijuana, an Exportadora employee chartered an air taxi company to carry the passengers from Guerrero Negro to Tijuana.

The pilot of the air taxi crashed into a hill, and the plane fell on American soil. The pilot, Omachi, Sugimoto and Kodani were killed.

Appellees, Sugimoto's, Kodani's and Omachi's survivors, brought a wrongful death action against Exportadora. Exportadora challenged the district court's jurisdiction on the ground of sovereign immunity. The court held that it had jurisdiction. Exportadora appealed.

The court of appeals held that in transporting the passengers, Exportadora engaged in commercial activity in the

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United States, and so fell within one of the exceptions of the Foreign Sovereign Immunities Act. On remand, the district court found that the crash was due to the pilot's negligence, and found Exportadora liable.

Exportadora appealed, challenging the district court's jurisdiction. Exportadora also contended that it should not have been held liable for the pilot's negligence when the pilot was the employee of the air taxi, an independent contractor.

[1] Jurisdiction existed. [2] Exportadora was engaged in commercial activity within the United States when the air taxi flew in the United States air space. An element of the plaintiffs' claim consisted of the tortious flying of the plane in United States air space.

[3] In addition, as a matter of California law, Exportadora was liable for the tortious performance of the pilot. Exportadora controlled the transportation offered to business visitors to its plant and company town; Exportadora decided whether visitors from abroad were welcome, approved them, arranged for their transportation, paid all the expenses, fed them, and determined where they would stay and how they would come and how they would go.

COUNSEL

Clyde Greco, Jr., Greco & Traficante, San Diego, California, for the defendant-appellant.

Robin Foor, Belmont, California, for the plaintiffs-appellees.

OPINION

NOONAN, Circuit Judge:

Exportadora De Sal, S.A. De C.V. (Exportadora) appeals from the judgment entered after a bench trial in a wrongful

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death action brought by the survivors of Katsuo Sugimoto, Yoshihito Kodani and Hideo Omachi (the plaintiffs). We have jurisdiction under 28 U.S.C. § 1330, and affirm.

FACTS

Exportadora is a manufacturer of salt owned 51 percent by the government of Mexico and 49 percent by Mitsubishi Corporation of Japan. Exportadora is a major producer of salt, which it markets internationally. It has a manufactory of salt at Guerrero Negro, Mexico. The plant is located in a company town. The most convenient city in proximity to Guerrero Negro is San Diego, California. Exportadora maintained an office in San Diego.

It is possible to get to Guerrero Negro from San Diego by bus, but the only convenient way of getting there is by Exportadora arranging a flight from Tijuana, Mexico to Guerrero Negro. For visitors to Guerrero Negro accepted by Exportadora, the practice was for the company to send a van to its San Diego office to transport them to the Tijuana airport. There was no telephone at the plant and it communicated with outside parties by telex to the San Diego office.

On September 4, 1987 an employee of Mitsubishi asked Exportadora to provide transportation for Omachi to Guerrero Negro by car and company plane. Mitsubishi's telex noted that Omachi was a manager for Asashi, one of Exportadora's most important Japanese customers. A second telex from Mitsubishi to Exportadora stated, "We hope that your beautiful explanation and arrangements will charm him very much." A third telex thanked Exportadora for accepting "Omachi's visit to G.N."

On September 18, 1987 Mitsubishi asked Exportadora to arrange for transportation to Guerrero Negro for Sugimoto and Kodani by pick-up truck and company plane. Sugimoto and Kodani were professors of Tottori University in Japan

and were interested in an agricultural project at Guerrero Negro. On September 22 Sugimoto and Kodani arrived by air in San Diego and were met by a representative of Exportadora, who arranged for their overnight stay in San Diego. The following day Exportadora had them transported to the Tijuana airport from which they flew in the company plane to Guerrero Negro. The company prepared a schedule showing that they would return to Tijuana on September 30.

On September 27 Omachi arrived at San Diego and on the following day was transported by Exportadora's van to Tijuana and by company plane to Guerrero Negro. His return was also scheduled for September 30. In Guerrero Negro Omachi, Sugimoto and Kodani were fed in the Exportadora company dining room and were housed without charge at Exportadora's guest quarters.

The company plane was not available on September 30 because of a directors' meeting. An Exportadora employee chartered an air taxi company to carry the scheduled passengers from Guerrero Negro to Tijuana.

Flying in heavy fog on the morning of September 30 in air space of the United States, the pilot of the air taxi crashed into a hill outside of Tijuana and fell on American soil. The district court found the crash due to the pilot's negligence in descending below the proper glide path and in not executing a missed approach when required to do so.

The crash killed the pilot and the passengers.

PROCEEDINGS

The plaintiffs brought suit against Exportadora. Exportadora challenged the jurisdiction of the district court on the ground of its sovereign immunity under 28 U.S.C. §§ 1603(a), (b)(2) and when the district court held it had jurisdiction, Exportadora appealed to this court. We held that in transport-

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ing Omachi, Sugimoto and Kodani Exportadora had been engaged in commercial activity in the United States and so fell within one of the exceptions of the Foreign Sovereign Immunities Act, *viz.* "the action is based upon a commercial activity carried on in the United States by a foreign state." 28 U.S.C. § 1605(a)(2). *Schoenberg v. Exportadora*, 930 F.2d 777 (9th Cir. 1991). We found the commercial activity to lie in Exportadora's "arranging transportation for its prospective business partners" in the case of Omachi and appeasing the Mexican government in the case of the transportation provided to Sugimoto and Kodani. *Id.* at 780.

On remand, a bench trial was held in which the district court found Exportadora liable on the basis of several theories of liability. Exportadora appeals.

ANALYSIS

Jurisdiction

[1] Exportadora raises again the question as to jurisdiction, contending that despite *Schoenberg*, the issue remains open in the light of *Saudi Arabia v. Nelson*, 113 S.Ct. 1471 (1993). The plaintiffs argue that Exportadora waived jurisdiction after the decision in this court in *Schoenberg*. We need not address that argument, because we hold that under the precise test set by *Saudi Arabia* jurisdiction exists.

[2] According to *Saudi Arabia*, an action is based on commercial activity in the United States if an element of the plaintiff's claim consists in conduct that occurred in commercial activity carried on in the United States. *Id.* at 1477. In the instant case Exportadora was engaged in commercial activity within the United States when the air taxi flew in United States air space, and an element of the plaintiffs' claim consists in the tortious flying of the plane in United States air space. The jurisdictional requirement of the first clause of § 1605(a)(2) was met.

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Tortious Conduct

On appeal Exportadora argues that the district court found pilot negligence by indulging the presumption that if the plane hit a hill in the fog, the failure must have been the pilot's. On the contrary, the district court eliminated a variety of other possible causes of the crash and relied on the opinion of an aviation accident investigator whom it found credible and reliable. There was no clear error in the district court's conclusion that it was a negligent mistake by the pilot that was the cause of the accident.

Basis for Liability

Exportadora presses that it should not be held liable for the pilot's negligence when the pilot was the employee of the air taxi, which the district court characterized as "an independent contractor." The general rule is clear that one is not liable for the tortious acts of an independent contractor. The rule is riddled with exceptions so that there is "only a small area in which the so-called general rule operates." 6 Witkin, *Summary of California Law* § 1009 (1987). California law in this respect is in harmony with the *Restatement (Second) of Torts* § 409, comment b, which states that the rule "can now be said to be general only in the sense that it is applied when no good reason is found for departing from it."

[3] Here there is good reason for departing from the already-eroded rule. Exportadora controlled the transportation offered to business visitors to its plant and company town. Exportadora decided whether visitors from abroad were welcome, approved them, arranged for their transportation, paid all the expenses, fed them, determined where they would stay and how they would come and how they would go. It would be unconscionable to permit Exportadora to insulate itself from liability for negligence by providing the transportation for which it was responsible through an air taxi which carried piteously small amounts of insurance per passenger. As a mat-

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ter of California law Exportadora was liable for the tortious performance of the pilot.

AFFIRMED.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HIROKO SUGIMOTO; KIMIKO KODANI; MAYUMI NUKIWA; ERI OMACHI; KUNIKO OMACHI,	)	No. 93-55716
	)	DC No. CV-88-01532-JMF
Plaintiff-Appellees,	)	ORDER AMENDING OPINION
vs.	)	
EXPORTADORA DE SAL, S.A. DE C.V.,	)	
Defendant-Appellant.	)	

Filed: July 1, 1994

Before: TANG, PREGERSON and NOONAN, Circuit Judges

The opinion filed on March 25, 1994 is amended as follows: At slip op. page 2893, 5 lines from the bottom, strike the sentence beginning "It would be . . ." and replace it with the following:

> Exportadora remains liable for the enterprise, although the air taxi was an independent taxi: "the enterprise, notwithstanding the employment of the independent contractor, remains, the

employer's" when it "is the party primarily to be benefited . . . selects the contractor . . . is free to insist upon one who is financially responsible, and to demand indemnity from him, [and] the insurance necessary to distribute the risk is properly a cost of the employer's business." Van Arsdale v. Hollinger, 68 Cal.2d 245, 253; 437 P.2d 508, 513 (1968).

APPENDIX C

Transcript Of Findings And Conclusions
Before The Honorable James M. Fitzgerald
United States District Judge
March 9, 1993

SAN DIEGO, CALIFORNIA TUESDAY, MARCH 9, 1993

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(Call to order of the Court.)

THE COURT: We're here this morning in the case of Sugimoto and others vs. Exportadora de Sal, 88-1532. I'm going to begin this morning to place on the record my findings of fact and conclusions of law. The findings and conclusions will be largely taken from the notes which I have made up during the trial of the case and from our investigation of the legal issues which have been raised in the course of the trial.

The findings and conclusions which I now place of record will be my decision in the case. I do not intend to enter a formal decision.

The court recorder will prepare a transcript, and the transcript will be made part of the official record in the case and will reflect my decision.

Upon the completion of the transcript, the court recorder will notify the parties who I have requested to make arrangements with the court recorder so that they may order out the transcripts.

An additional copy of the transcript will be provided to Judge John Rhoades who has had the responsibility for the management of the case, and I would like a copy sent to my chambers in the U.S. District Court for the District of Alaska so that I may address any post-trial applications or motions made by the parties.

I shall now begin with the findings, and I will request that the findings and conclusions be entered in the transcript by identifying each of the findings and conclusions by number and that each of the findings and conclusions begin after a double space.

FINDINGS

(1) The claimants in this litigation are the survivors of

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Doctor Katsuo Sugimoto, Doctor Yoshihito Kodani and Mr. Hideo Omachi who, until the time of their deaths on September 30, 1987, were citizens and residents of Japan. Doctor Sugimoto and Doctor Kodani were at the time of their deaths professors of agriculture at Tottori University in Hamasaka, Japan.

For about five years prior to September 30, 1987, Tottori University had been involved in an agricultural project located in Guerrero Negro, Baja California, Mexico. Mr. Omachi was at the time of his death the manager of the raw materials section of the purchasing department of Asahi Chemical Industrial Company.

(2) The Defendant in the present litigation is Exportadora de Sal, a corporation formed under the laws of Mexico which is 51 percent owned by the United Mexican States and 49 percent owned by Mitsubishi Corporation of Japan. Exportadora manufactures salt from seawater at Guerrero Negro and sells the product in domestic and international markets. Exportadora is one of the world's largest producers of industrial salt producing about six million metric tons each year.

Asahi Chemical is said to be one of Exportadora's most important customers for salt. Mr. Omachi had arranged to visit and inspect Exportadora's facilities.

(3) From 1974 until 1991, Exportadora maintained an office at San Diego, California which was connected by telex with Exportadora's offices at Guerrero Negro and Mexico City. The San Diego office was heavily involved in purchasing, shipping and transporting materials for Exportadora's business and, to some extent, operated as a communication center with Mitsubishi in Japan.

(4) In Schoenberg vs. Exportadora de Sal, 930 F.2d 777 (9th Cir. 1991), the Court of Appeals resolved jurisdictional and choice-of-law issues raised by Exportadora on an appeal taken from the rulings of the District Court. In its opinion, the Court of Appeals set out the underlying facts leading up to the present litigation with clarity and precision, and I quote:

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"Exportadora is a corporation which produces salt in Mexico. The Mexican government owns 51 percent of the corporation, and the Mitsubishi Corporation of Japan owns the remainder. Exportadora maintained an office in San Diego which communicated with outside parties on behalf of the Exportadora plant in Guerrero Negro, Mexico because the plant had no telephone services. In September 1987, five relatives of the Plaintiffs traveled from San Diego to Exportadora's Guerrero Negro facility. Exportadora drove them form San Diego to the Tijuana airport and then flew them from there to Guerrero Negro on its own airplane. For the return trip, Exportadora's plane was unavailable. It chartered another plane from Aviones de Sonora, S.A., a Mexican corporation, to fly the travelers back from Guerrero Negro to Tijuana.

On that flight back, fog at Tijuana necessitated an instrument landing approach to the Tijuana airport. Such an approach requires the airplane to fly into United States air space in order to land from the west. The plane failed to maintain a sufficient altitude and crashed short of the Tijuana airport in United States territory near the Mexican border, killing all aboard. The Plaintiffs in this action are the survivors.

The five travelers made the trip to Guerrero Negro for different purposes. Ramon Schoenberg and Manuel Hernandez, both California residents, worked for a pump manufacturer and traveled to Guerrero Negro to solicit business. Hideo Omachi, a resident of Japan, was a purchasing agent for a Japanese company. Katsuo Sugimoto and Yoshihito

> Kodani, also residents of Japan, were representatives of Tottori University in Japan and were visiting an agricultural experiment in Guerrero Negro adjacent to Exportadora's salt production facility."

(5) Former U.S. District Judge J. Lawrence Irving entered findings that Exportadora arranged transportation of the decedents between Guerrero Negro and San Diego and transported them. On review, the Ninth Circuit held the District Court did not clearly err in making this finding. Continuing the opinion, the court held that, quote:

> "Exportadora engaged in commercial activity in arranging transportation for its prospective business partners, Schoenberg, Hernandez and Omachi, bringing them to Guerrero Negro facilitated potential commercial dealings. As for the university representatives Sugimoto and Kodani, Exportadora arranged transportation for them at the behest of its majority stockholder, the Mexican government. Appeasing one's majority stockholder is an activity that a private entity can perform and benefits future commercial dealings in other contexts by maintaining good will."

(6) The District Court also found that Exportadora maintained a regular air and auto link between its San Diego and Guerrero Negro offices as part of its commercial operations, that it arranged through its San Diego office round-trip transportation for the decedents from San Diego to Guerrero Negro and that all five decedents began their trips to Guerrero Negro in San Diego.

On review, the Court of Appeals upheld findings of the District Court. Moreover, the court upheld the conclusion of the District Court, and I quote:

"Given these findings, the District Court correctly concluded that the relevant activity was the round trip. The decedents did not make arrangements for legs of the trips separately. They made round-trip arrangements through the San Diego office at the outset, so we consider the arranged travel as a whole."

(7) At the beginning of the present trial, I addressed the findings of the District Court that had been reviewed by the Court of Appeals. Exportadora had at the outset of trial suggested those findings need not and should not be accepted as the law of the case. In my ruling, which I placed of record on January 13, 1993, I noted that, in order to determine the underlying jurisdictional issues, it had been necessary for the Court of Appeals to review the findings; that is, unless those findings were to be accepted, the jurisdictional issues could not be resolved by the Court of Appeals.

The transcript of my ruling contains an error and should be corrected to state that the decisions of the Court of Appeals on Exportadora's immunity claim are not subject to review in this court. I ruled that the factual findings accepted by the Court of Appeals must be followed in this court. I then went on to decide to what extent the findings upon which the Court of Appeals had relied were binding on trial in this court.

I held that it was clear that the Court of Appeals had accepted the earlier findings in the District Court but expressed no opinion as to the tort consequences of those findings. While the legal consequences of findings had been resolved by the Court of Appeals on the jurisdictional issue, the extent to which those findings have tort consequences remain an issue to be resolved at the trial. Nevertheless, as it developed, a great deal of evidence has been presented relating to the earlier findings of the District Court.

(8) Tottori University in Hamasaka, Japan had for some years prior to September 30, 1987 been involved in an agricultural project located at Guerrero Negro, Baja California,

Mexico. Exportadora's production facilities and plant are located in Guerrero Negro. The company maintained an office in Mexico City and, from 1974 to 1991, had an office in San Diego. On September 30, 1987, the manager of Exportadora's San Diego office was Manuel Guzman.

(9) In 1987, no regularly scheduled commercial airline operated between San Diego and Guerrero Negro, Baja California. The direct distance between the two cities is approximately 312 nautical miles. Transportation between San Diego and Guerrero Negro was by motor vehicle or by aircraft. Travel by motor vehicle from Tijuana to Guerrero Negro required nine hours. Exportadora operated a corporate jet aircraft which often undertook round trips from Guerrero Negro, where Exportadora maintained an aircraft hangar, to Tijuana on Mondays, Wednesdays and Fridays. Exportadora employed a pilot and copilot to fly its corporate aircraft, the Westwind.

(10) Transportation aboard the Westwind had to be approved by management or the directors of Exportadora. The Westwind was not offered for public use. Travel aboard the aircraft was limited to company directors, officers or employees and their dependents or other passengers for whom permission had been granted by Exportadora. Included among these passengers were business visitors, vendors and other invitees.

When the Westwind was not available for a scheduled flight, Exportadora entered into charter agreements with one of several licensed air taxi operators who provided an airplane and pilots for the charter.

(11) During the relevant time period in 1987, Mr. Matsushita of Mitsubishi's Tokyo office submitted requests or offers on behalf of Japanese visitors who desired to visit Guerrero Negro. In making arrangements for Japanese visitors to Guerrero Negro, Matsushita often communicated with Juan Luna who served in the administrative department of Exportadora in Mexico City.

On other occasions, Matsushita went directly to the top management of Exportadora to arrange a visit for the

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representative of a company whose business might be important to Exportadora.

(12) An exchange of telex communications between Luna and Matsushita in June of 1987 defined the program for the Tottori agricultural project in the latter part of 1987. On June 23rd, Luna sent a telex to Matsushita confirming travel on the company aircraft and reservations at San Diego and Guerrero Negro for Doctor Takeuchi and Doctor Toyama.

Luna requested more information on the agenda and work program involving the agricultural project and any documents that would support the visit of the two professors.

The following day, June 24, Matsushita responded to Luna's request for additional information. At the time Matsushita notified Doctor Takeuchi that travel and reservations had been arranged, Matsushita obtained from Doctor Takeuchi a brief outline of the planned program for the agricultural project. According to Matsushita, Dr. Takeuchi planned to remain at Guerrero Negro from the end of August until early December 1987.

Two other professors planned to stay at Guerrero Negro about three months, and several other professors would visit from time to time for about a week. The theme of the experiment planned for August to December 1987 included:

(1) Vegetable cultivation using water-holding substances.
(2) Study about salt accumulations on the surface of the ground.

In addition, Doctor Takeuchi planned to discuss with Exportadora the future of the agricultural field at Guerrero Negro including the possibility of another project.

(13) Matsushita continued to inform Exportadora of the names and travel itineraries of professors who were to visit the agricultural project at Guerrero Negro. He sent a telex to Luna on September 18 indicating that two professors of Tottori University, Doctor Katsuo Sugimoto and Doctor Yoshihito

Kodani, were expected to visit the project.

Matsushita requested that Luna arrange transportation between San Diego and Guerrero Negro for the two professors by pickup truck or company plane leaving on Wednesday, September 23rd and returning on Thursday, October 1st, with hotel reservations in San Diego and accommodations at Guerrero Negro. Matsushita also informed Luna of the scheduled arrival time of Doctor Sugimoto and Doctor Kodani at San Diego.

(14) The two professors, Doctor Sugimoto and Doctor Kodani, were met at Lindbergh Field in San Diego on September 22nd by Mikiko Izumi. She had previously met Doctor Sugimoto in 1986 when he visited the agricultural project at Guerrero Negro. On that occasion, she took Doctor Sugimoto to a bus terminal in Tijuana to catch a bus traveling overnight to Guerrero Negro.

When she met Doctor Sugimoto and Doctor Kodani on September 22, she arranged to put them up at the Executive Hotel and that evening had dinner with them. The expenses were borne by Exportadora.

On the following morning, Wednesday, September 23rd, they were taken to Tijuana airport by the company van and boarded the Westwind for the flight to Guerrero Negro.

(15) Matsushita sent a telex on September 4, 1987 to the attention of the manager of Exportadora, Manuel Millan, concerning a request by Omachi to visit Exportadora's salt field at Guerrero Negro. Matsushita informed Millan that Omachi was the new manager of the raw material section of Asahi Chemical and that one of Omachi's areas of responsibility was the purchase of raw salt. He went on to say that Asahi Chemical is one of the most important customers for Mitsubishi's Mexican salt business.

Matsushita provided Omachi's proposed itinerary which provided that Omachi depart San Diego from Guerrero Negro on September 28, return from Guerrero Negro to San Diego on September 30 and on to Los Angeles with departure from Los Angeles en route to Japan at 12:50 p.m. on September 30th.

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Matsushita sent a second telex to Millan on September 7 stating that Asahi Chemical and Omachi were awaiting Millan's confirmation for the visit to Guerrero Negro. Matsushita also noted that Omachi was very anxious because he was being pushed by his boss to finalize his business trip as soon as possible.

The next day, September 8th, Matsushita sent a telex to Millan thanking him for confirming Omachi's visit to Exportadora's plant. Once again, Matsushita stressed that Omachi had authority over salt purchases and that Asahi Chemical was a major customer.

Matsushita requested that Millan instruct his staff to make certain Omachi was given a good impression of Exportadora's salt. Finally, Matsushita sent yet another telex concerning Omachi's visit to Juan Bremer, Exportadora's subdirector of production at Guerrero Negro, Mr. Shinohara, a Mitsubishi representative and assistant to Exportadora's co-manager, and Isamu Hina at Guerrero Negro. Matsushita summed up his telex by saying, "We hope that your beautiful explanation and arrangements will charm him very much."

(16) Mr. Omachi was met at Lindbergh Field in San Diego on September 27, 1987 by an employee of Baja Bulk Carrier, S.A., a company associated with Exportadora. Arrangements had been made to put Omachi up for the night at the Westgate Hotel in San Diego. On the morning of September 28, Mr. Omachi was taken in Exportadora's van from San Diego to Tijuana airport where he boarded the Westwind for the flight to Guerrero Negro.

(17) Matsushita was employed by Mitsubishi in its Tokyo office at all times relevant to this litigation. Documentary evidence, including telex communications as well as the testimony of witnesses, establish that Matsushita was authorized on behalf of Exportadora at all times between June and September 1986 to conduct negotiations with Japanese representatives such as Mr. Omachi of Asahi Chemical and Doctor Sugimoto and Doctor Kodani of Tottori University for visits to the Exportadora facilities at Guerrero Negro.

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(18) Matsushita received offers or requests by business representatives such as Omachi or the Tottori University professor to travel from Japan by way of San Diego to Guerrero Negro, Baja California to visit Exportadora's facilities. He was authorized by Exportadora to offer accommodations to approved visitors at San Diego and Guerrero Negro as well as transportation, all at Exportadora's expense, from San Diego to Guerrero Negro and return.

(19) On the record there is little evidence of the actual communications between Matsushita acting for Exportadora or on Exportadora's behalf and Mr. Omachi or the Tottori professors, Doctor Sugimoto and Doctor Kodani.

The three visitors were killed in the aircraft accident of September 30, 1987. Matsushita's testimony, either by way of deposition or otherwise, was not offered at trial. In addition, the records are not complete. It cannot now be determined whether the Japanese visitors submitted requests or made definite offers including all of the terms and conditions of the visits to Guerrero Negro. There is, however, ample evidence provided by the documents and in the testimony of witnesses to establish the basic terms and conditions of the agreement arrived at between Exportadora and Mr. Omachi and between Exportadora and Professors Sugimoto and Kodani.

(20) Mr. Omachi was to arrive at San Diego on September 27th. He was met by a representative of Baja Bulk, S.A. and put up overnight at the Westgate Hotel in San Diego. Exportadora arranged transportation for him by company van and airplane from San Diego to Guerrero Negro on September 28th and for his return from Guerrero Negro to San Diego on September 30th.

(21) Professors Sugimoto and Kodani were met on September 22nd at Lindbergh Field by Exportadora's representative, Mikiko Izumi. She arranged their accommodations at the Executive Hotel, San Diego and on the following day, September 23rd, transportation was provided by Exportadora's van to Tijuana airport where the two professors boarded the Westwind for Guerrero Negro. They were

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scheduled to return to Tijuana by air on September 30th.

(22) All accommodations at San Diego and at Guerrero Negro for the three Japanese visitors were arranged by Exportadora. The transportation from San Diego to Guerrero Negro and the return to San Diego was entirely arranged by Exportadora. The three Japanese visitors took no part in making arrangements for accommodations in San Diego or Guerrero Negro, nor did they take any part in making the arrangements for travel between San Diego to Guerrero Negro and return to San Diego.

(23) In making the arrangements, Exportadora undertook to accommodate the travel arrangements of the three Japanese visitors, from the time of their arrival in San Diego until the return of the visitors to San Diego. The early-morning departure of the charter aircraft from Guerrero Negro to Tijuana on September 30 was arranged by Exportadora to meet the travel requirements of Mr. Omachi in order to return him to San Diego in time for him to proceed on to Los Angeles to make his scheduled departure from Los Angeles at 12:50 p.m.

(24) As the Ninth Circuit held in Schoenberg vs. Exportadora, the transportation of Mr. Omachi and Professors Sugimoto and Kodani from San Diego to Guerrero Negro and return was in the nature of commercial transactions. In exchange for its agreement to provide Omachi's accommodations and transportation, Exportadora received consideration in the form of potential commercial dealings.

In return for providing accommodations and transportation to Professors Sugimoto and Kodani, Exportadora received consideration by way of future commercial dealings in other contexts.

(25) In July of 1987, Carmen Chavez Frazier, at the direction of Manuel Guzman, manager of Exportadora's San Diego office, sent a telex to Juan Bremer, advising him that two technicians from Berkeley Pump Company desired to visit Guerrero Negro for the purpose of providing information to Exportadora employees on the use of Berkeley Pump products. Exportadora was at that time a major customer of Berkeley

Pump. On September 10th, Chavez sent another telex to Bremer's attention stating that two technicians from Berkeley Pump were interested in visiting Guerrero Negro to offer technical recommendations on use of Berkeley pumps at Exportadora's plant.

Finally, on September 18th, Bremer responded by telex granting permission for the two technicians to arrive on Monday, September 28 and to return to San Diego on Wednesday, September 30. Chavez sent a telex to Bremer on September 22nd confirming the arrangements. The two technicians, Schoenberg and Hernandez, left San Diego aboard the Westwind on September 28th.

(26) Ms. Peregrino, an attorney in the administrative office of Exportadora, was authorized to schedule the company aircraft, Westwind, and to obtain charters of air taxi companies if the Westwind should not be available because of maintenance or for other reasons.

Peregrino caused schedules to be prepared including lists of passengers to be carried on the Westwind or on chartered flights by air taxi companies. The passenger schedules were published each week for the upcoming two-week period.

(27) Enrique Achoy was in charge of the guest house and dining facilities of Exportadora and, when authorized or instructed by Peregrino, arranged with air taxi companies to obtain an aircraft of sufficient size to carry scheduled passengers.

(28) The names of Doctor Sugimoto and Doctor Kodani appear on the schedule published for the weeks of September 20th and September 27th. They were scheduled to arrive at Guerrero Negro from Tijuana on Wednesday, September 23rd. On the same schedule, arriving on Monday, September 28th from Tijuana to Guerrero Negro, were the two Berkeley Pump technicians, Mr. Schoenberg and Mr. Hernandez.

(29) Mr. Omachi's name did not appear on the schedules for September 20th but did appear on the schedules published for the weeks of September 27th and October 4th. According to those schedules, he was to arrive from Tijuana on September

28th.

(30) The five passengers listed for departure from Guerrero Negro on September 30th were Doctor Sugimoto, Doctor Kodani, Mr. Omachi, Mr. Hernandez and Mr. Schoenberg.

(31) The Westwind was not available for the flight scheduled from Guerrero Negro to Tijuana and return on September 30th. A directors' meeting had been arranged in Mexico City, and the Westwind was committed to provide air transportation for Exportadora's executives.

Peregrino authorized Achoy to obtain a charter of an air taxi company to carry the scheduled passengers from Guerrero Negro to Tijuana airport.

(32) For several years prior to September 30, 1987, Exportadora arranged charters with several air taxi companies on those occasions when the Westwind was not available. One of the air taxi companies frequently chartered by Exportadora was Aviones de Sonora. The records of Exportadora disclose that Aviones charters often carried corporate directors and officers and their wives and children.

Exportadora assumed the expenses for the charter and made no charge to the passengers. In short, the transportation of Exportadora's personnel and their dependents or of business visitors on charter flights was on the same basis as flights made aboard the corporate aircraft, Westwind.

Until the accident of September 30, 1987, Aviones had provided Exportadora with safe and reliable air service on charter flights between Guerrero Negro and Tijuana and return.

(33) Achoy, upon being notified by Peregrino that the Westwind would not be available to carry the scheduled passengers from Guerrero Negro to Tijuana and return to Guerrero Negro on September 30th, undertook to charter an aircraft capable of carrying the number of passengers listed on the schedule. Five passengers had been scheduled to depart Guerrero Negro for Tijuana on that date and, on the return flight to Guerrero Negro, two passengers had been scheduled.

(34) Achoy made his selection of an air taxi company

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on the number of passengers to be carried and upon the availability of the company to furnish an aircraft capable of carrying the number of scheduled passengers.

Early in the afternoon of September 29th, Achoy obtained a charter from Aviones. Exportadora, by selecting Aviones, provided a licensed, qualified and fully competent air taxi operator. Exportadora was entirely responsible for the selection of Aviones, the passengers including the Japanese visitors and had nothing to do with arranging the charter. Achoy was aware that Mr. Omachi needed an early departure from Guerrero Negro in order to make his scheduled flight out of San Diego for Japan.

Achoy requested that the Aviones aircraft be flown from Hermosillo to Guerrero Negro on September 29 to be available for early-morning departure on September 30th.

(35) Pilot Raul Gutierrez Tellez was selected by Aviones to undertake the flight. Neither Achoy nor anyone else from Exportadora participated in selection of the pilot. Rather, the selection of the aircraft and the pilot rested in the hands of Aviones, a licensed and certified air taxi company.

(36) There is sharp conflict among the experts who were qualified at trial concerning Pilot Gutierrez' qualifications to undertake the flight of XAKOA on the morning of September 30, 1987. Jack Jaax, a very experienced and expert pilot, testified for the Plaintiffs. In Jaax' opinion, Pilot Gutierrez lacked sufficient instrument or simulator time during the six-month period immediately prior to the accident to remain current for an instrument rating or to fly an ILS approach. Jaax rested his opinion on an examination of the pilot's log book, the performance of the pilot in making the flight and the actual approach of flight XAKOA to runway 09 at Tijuana as well as the circumstances of the accident.

(37) Experts offered by the Plaintiffs and the Defendants have relied in part on the pilot's log book in reaching their opinions. At trial, Plaintiffs sought to undermine the validity of the log book by offering evidence that a page in the log book containing the validation of the pilot's license and

instrument rating dated June 29, 1987 and several of the following pages were not in the handwriting of the pilot.

Plaintiffs suggest by inference that falsification took place in order to establish the qualifications of the pilot to fly XAKOA from Guerrero Negro to Tijuana and return on the morning of September 30, 1987.

The Defendant, Exportadora concedes that the handwriting may not be in the writing of the pilot and indeed Defendant's expert, Robert Griscom in his testimony observed that the handwriting in the pilot's log book may be that of different persons. He suggested, however, that this fact would make little difference for, based upon his own experience as a pilot and as a Federal Aviation Administrator, where he examined hundreds of pilot logs, he found that entries in pilot logs were often made by airline companies, secretaries, spouses and others as well as by the pilot.

(38) At the close of the evidence, Plaintiffs sought to offer a questioned-document examiner to testify that the questioned handwriting in Gutierrez' log book was not the pilot's handwriting. I did not accept the evidence offered by the expert and have placed my reasons on the record.

Although I find that the questioned entries in Gutierrez' log book were probably not in his handwriting, this in itself does not prove the entries false, and other evidence supports my finding that Gutierrez was qualified.

(39) Plaintiffs also offered Richard Taylor who qualified as an expert pilot to testify to the competency of Gutierrez as well as to other matters. While Taylor was unable to say, based upon the regulations for air traffic (Mexico), whether the pilot qualified for instrument flight, he did concede that the pilot might have been qualified under the appropriate regulations.

However, based upon his examination of pilot's log book and the performance of the pilot, Taylor expressed his opinion that the pilot was neither competent nor qualified to undertake an instrument flight at the time he made the flight

from Guerrero Negro to Tijuana.

(40) Robert Griscom who qualified as an expert pilot and as an expert accident investigator expressed a contrary view. In his opinion, Gutierrez was in fact well qualified to operate as pilot in command of a Cessna 340A. Griscom based his opinion on a thorough investigation of the pilot's qualifications.

In the course of his investigation, Griscom learned that Gutierrez had graduated from the Flying School of Mexico and had met all requirements for qualifying as a commercial pilot.

In order to qualify for an instrument rating, a pilot is required to have 40 hours of instrument time. Gutierrez had accumulated more than 123 hours of instrument time up to the date of the accident, September 30th.

In order to maintain a current instrument rating, a pilot must either fly two hours under the hood with a qualified instructor or have six hours of simulator time within the past six months.

Although records of pilot revalidation for Aviones were kept in the office of the Commandante at Hermosillo airport, the records are maintained for only one year and are then destroyed. However, Griscom in the course of his investigation found that the records of revalidation of the pilot's commercial licenses and instrument ratings are also maintained by air taxi companies and that Gutierrez had obtained a revalidation of his commercial license and instrument rating on June 29, 1987 validating his license and ratings until January 31, 1988.

Griscom further determined that Gutierrez did not log simulator time in his log book and that the handwriting in the log book may be of more than one person.

Finally, Griscom interviewed Commandante Juarez at Hermosillo airfield concerning Gutierrez' qualifications as a pilot.

(41) Griscom's investigation into pilot Raul Gutierrez Tellez' qualifications to operate as pilot in command of a Cessna 340A at the time of flight XAKOA from Guerrero Negro to Tijuana, September 30th, were detailed, thorough and provided reliable information upon which to rest his opinions.

(42) German Gaytan was qualified as an expert in the examination and qualification requirements of pilots, air controllers and aviation technical personnel in Mexico. He has served as chief examiner of the licensing department in the General Office of Civil Aviation and in the office of the Attorney General of Mexico.

To qualify as an air taxi pilot in Mexico, the pilot must have a commercial pilot license. In order to obtain a commercial pilot license in Mexico, the pilot must have attended a flight training school and accumulate 180 hours of flight time. The pilot of XAKOA on September 30, 1987, Raul Gutierrez Tellez, had flown 2,623 hours.

A pilot seeking an instrument rating must fly 40 hours instrument time, and Pilot Gutierrez had flown 123.5 hours of instrument time.

To be qualified for a multi-engine rating, the pilot must fly 10 hours and Pilot Gutierrez had flown 2,079 hours. Gaytan, who as chief examiner first issued a pilot's license to Gutierrez, reviewed the records maintained by the General Office of Civil Aviation and Gutierrez' log book.

On the basis of his investigation, Gaytan found that Gutierrez' commercial pilot license and instrument rating had been revalidated on June 29, 1987 and were valid until January 31, 1988. Review by Gaytan of the General Office records revealed that Pilot Gutierrez had no accidents and no recorded reprimands or other disciplinary action taken against him prior to the fatal accident on September 30, 1987.

(43) Gaytan made a careful and thorough inquiry into the records available to him at the Department of Civil Aeronautics and his testimony was credible and reliable. Pilot Gutierrez at the time of the flight of XAKOA from Guerrero Negro to Tijuana on September 30, 1987 was a qualified pilot for the flight, and his commercial pilot license had been revalidated June 29, 1987 and was current. His instrument rating had been revalidated prior to the flight and would have been valid until January 31, 1988.

(44) Richard Taylor examined the appropriate

regulations for air traffic (Mexico) to determine the requirements for a copilot on charter flights by an air taxi company. The regulations do not require copilots on aircraft of less than 12,500 pounds if the aircraft carries certain instruments or equipment including an autopilot. He was aware that XAKOA was equipped with an autopilot. However, without additional information, he could not say if the flight of XAKOA on September 30th was in violation of the regulations requiring a copilot.

(45) In Robert Griscom's opinion, no copilot was required for the flight of XAKOA from Guerrero Negro to Tijuana on September 30th. Based on his examination of Article 132(b) of the regulations for air traffic (Mexico), he expressed his opinion that XAKOA carried the necessary navigational equipment including an autopilot.

He also stated it was the practice or custom to qualify pilots for operation of the autopilot at the time a pilot prepared for revalidation of their licenses and instrument ratings. German Gaytan who had reviewed the official records and pilot log of Raul Gutierrez Tellez found that, at the time of departure of XAKOA from Guerrero Negro on the morning of September 30th, the instruments and other navigational equipment installed in the aircraft and the qualifications of Pilot Raul Gutierrez Tellez allowed the flight from Guerrero Negro to Tijuana to be conducted under the controlling regulations, Article 134(b)(II), Mexican Air Regulations, without a copilot.

(46) I find that the instruments and other navigational equipment installed on the aircraft and the qualifications of the pilot, Raul Gutierrez Tellez permitted the flight of XAKOA to be conducted without a copilot in full compliance with the controlling Mexican air traffic regulations.

Immediately prior to the time of departure, XAKOA shortly after 6:00 a.m. on the morning of September 30, 1987, Pilot Gutierrez would have had available to him terminal weather and airway reports for a flight to Tijuana. Access to Tijuana airport weather could be obtained at that time by pilots 24 hours a day by telephone call to government-maintained

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facilities at Mazatlan.

(47) Following Gutierrez' arrival at Guerrero Negro, Enrique Achoy took the pilot to Exportadora's guest quarters to provide overnight accommodations for him. As they entered the dining room, Achoy observed a group of Japanese at dinner. The group included Doctor Sugimoto, Doctor Kodani, Mr. Omachi, Mr. Hina and probably Doctor Takeuchi.

Achoy did not speak Japanese but spoke in either Spanish or English to Mr. Hina or Doctor Takeuchi. Achoy introduced Gutierrez saying that he would be their pilot for the flight on the next day.

The departure of the flight from Guerrero Negro to Tijuana had been originally scheduled at 7:00 a.m. The Westwind would have been able to make the flight in approximately one hour and, upon departure at 7:00 a.m., would arrive at Tijuana by 8:00 a.m., but the Cessna 340A furnished by Aviones was a turbo-driven propeller aircraft and required two hours to make the flight.

Gutierrez, when he learned that Omachi needed to arrive at Tijuana at 8:00 a.m., informed Achoy that the departure of XAKOA should be at 6:00 a.m.

Hina then informed Mr. Omachi, Doctor Sugimoto and Doctor Kodani that departure of the flight was scheduled for 6:00 a.m.

Achoy also told Gutierrez that, if conditions were not right in Tijuana airport, the pilot could proceed to Mexicali.

(48) Jose Blanco, the supervisor of salt production for Exportadora at Guerrero Negro, informed Schoenberg and Hernandez on the evening of September 29 that the aircraft was leaving very early the next morning because a Japanese passenger had to arrive at Tijuana in order to make a flight connection.

(49) Exportadora scheduled the flight to depart so that Omachi could meet his travel arrangements beyond San Diego. But the decision to make the flight and full control of the aircraft during the flight rested with Pilot Raul Gutierrez Tellez.

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Insofar as Exportadora was concerned, Aviones was an independent contractor responsible for the selection of a competent, qualified pilot and a suitably, properly maintained aircraft. But the transportation of the passengers by Aviones from Guerrero Negro to Tijuana was on behalf of Exportadora in discharge of Exportadora's obligation to the scheduled passengers. The Aviones pilot and aircraft was nothing more than a substitution for Exportadora's pilot and the Westwind, and the obligation to return the passengers from Guerrero Negro to San Diego remained with Exportadora.

(50) Shortly after 6:00 a.m. on September 30, 1987, the five passengers boarded XAKOA for the flight to Tijuana. Prior to boarding, the pilot weighed the baggage of each passenger. Victor Garcia, employed in the San Diego office of Exportadora, estimated mail bags from Guerrero Negro weighed five to seven pounds, although heavier loads might be taken in mail bags from Tijuana to Guerrero Negro.

It has been suggested by Plaintiffs that XAKOA may have been overloaded at the time of departure. Evidence related to the takeoff weight of the aircraft fails to prove that XAKOA was overloaded. No expert who testified as to the cause of the accident has formed an opinion that improper overloading of XAKOA was the cause of the accident.

I find that the Plaintiffs have failed to prove that XAKOA was either improperly loaded or overloaded for the flight from Guerrero Negro to Tijuana airport on September 30, 1987.

(51) Plaintiffs offered evidence suggesting that Exportadora caused the departure of XAKOA from Guerrero Negro to Tijuana when Tijuana airfield was below IFR conditions thereby causing the aircraft to make an approach to Tijuana airport when the airfield was below IFR minimums or had zero visibility.

Exportadora scheduled the flight of XAKOA to accommodate Omachi's travel schedule. The evidence is conflicting on whether Gutierrez filed an IFR flight plan.

(52) Robert Griscom, the expert pilot and accident

investigator, expressed an opinion that Gutierrez filed an IFR flight plan designating Mexicali as an alternate airport. He rested this opinion upon his investigation in which he learned of the altitude flown by the pilot en route to Tijuana. The altitude flown by the pilot, Gutierrez from Guerrero Negro to Tijuana would have been inappropriate for VFR flight.

(53) Richard Taylor, a pilot expert for Plaintiffs, noted that the preliminary report of the NTSB reported that an IFR flight plan had been filed for the flight of XAKOA to Tijuana the morning of September 30th. However, in the final NTSB report, Taylor noted that the appropriate entry for an IFR flight had not been entered in the report and believed that the NTSB investigator, Wahl, found a lack of sufficient information.

I find the evidence given by Robert Griscom to be credible and reliable on this point. It is more probable than not that Pilot Gutierrez filed an IFR flight plan prior to departing Guerrero Negro for Tijuana and that Gutierrez did so based on whatever information may have been available to him prior to departure of XAKOA from Guerrero Negro.

(54) After XAKOA departed for Tijuana airport, Achoy sent a telex advising Guzman at San Diego of the departure time. He backdated the telex to September 29.

(55) The two expert pilots who testified on behalf of the Plaintiffs as to the cause of the accident on September 30, 1987, Jaax and Taylor, were of the opinion that adequate fuel was on board XAKOA at the time Pilot Gutierrez made the approach to runway 09 at Tijuana.

(56) William Ross, who was qualified by the Plaintiffs as an expert aircraft accident investigator, expressed his opinion that at the time of impact the aircraft was neither at stall speed nor low power setting.

(57) But Plaintiffs also called a number of witnesses who testified they were unable to detect the odor of fuel at the time those witnesses were at the site of the wreckage September 30, 1987.

Among the witnesses who did not detect the odor of fuel or any signs of fuel spillage were James Evans, Jesus Cesena,

Terrance Baird, William Johnson and Carl Eklund.

(58) Several witnesses testified that shortly before the accident they heard an aircraft which they believed to have been the aircraft that was involved in the accident and that the engines of the aircraft sounded similar to engines running out of fuel or not normally operating.

These witnesses also presented by Plaintiffs included Juanita Reyes, Francisco Figueroa and Salvador Cervantes.

Finally, in an affidavit filed by Plaintiffs' attorney, Robin Foor, May 1, 1989, he stated, based on his personal knowledge, that a defective condition in the Cessna 340A caused a fuel leak which may have caused or contributed to the crash.

(59) Enrique Achoy, after the arrival of XAKOA on September 29, 1987 at Guerrero Negro from Hermosillo, asked Gutierrez whether the pilot had fuel for the flight. Gutierrez responded that he had.

William Ross, who arrived at the site of the wreckage on October 1st, examined the remaining wreckage of XAKOA. Much of the wreckage of the aircraft had by then been carried away since the NTSB investigator had failed to arrange for guards or other law enforcement protection overnight at the site of the crash.

Ross, however, was able to examine the remains of the fuselage of XAKOA and detected the odor of fuel in the upholstery. Ross was also able to examine photographs of the wreckage taken on September 30th including a wing-tip fuel tank. He found that a wing-tip tank had bulged forward from fuel pressure at the time of impact. In his opinion, the fuel then vaporized into the atmosphere. The fuel lines were torn and retained no fuel.

(60) The witnesses who believed that they heard the engines of the aircraft running out of fuel were not operating normally were, I find, not reliable witnesses concerning the condition of the engines or the fuel state of XAKOA shortly before impact.

(61) Neither the tape, Exhibit YYY, or transcript, Exhibit WW, indicate any communication between the pilot and

the air controller having to do with low fuel state or engine malfunction. The pilot on several occasions in his communications with the air controller indicated that he was considering an alternate field. It is highly improbable that the pilot would consider an alternate field in the event of engine malfunction or exhausted or low fuel state.

(62) The testimony of the pilot experts called by the Plaintiffs and of the expert aircraft accident investigator, Ross are credible, and their opinions having to do with fuel exhaustion and power settings at the time of impact are reliable.

The impact of XAKOA on the hillside on the approach of the aircraft to runway 09, Tijuana airport, was not caused by fuel exhaustion or from lack of fuel aboard the aircraft on the morning of September 30, 1987.

(63) The opinions offered by the experts are in sharp conflict on the cause of the accident. Plaintiffs' pilot experts are of the opinion that Raul Gutierrez Tellez was neither competent nor qualified to make the flight from Guerrero Negro to Tijuana on the morning of September 30, 1987 and in their opinion the cause of the accident was due to errors on the part of the pilot.

On the other hand, Defense expert Griscom is of the opinion that the cause of the accident can never be known because of the removal of the wreckage of the aircraft from the site of the accident during the evening of September 30th and the morning of October 1st.

Defendants' expert is also of the opinion that the air controller at Tijuana airport had taken full control of the approach made by the pilot to runway 09 and, under the circumstances then existing, contributed to cause the accident.

(64) Richard Taylor, a pilot expert qualified by the Plaintiffs, was of the opinion that Pilot Raul Gutierrez Tellez was neither qualified nor competent to make the flight from Guerrero Negro to Tijuana on September 30th. He based his opinion regarding the pilot's qualification on the pilot's log book. I have earlier made findings that the pilot was fully qualified to fly an IFR approach to runway 09 on September

30th.

(65) In Taylor's opinion, Pilot Raul Gutierrez Tellez demonstrated his lack of competence by not ascertaining the weather for the flight he was about to undertake, by attempting an approach under conditions of zero visibility and by failing to follow the proper glide slope to the runway.

In earlier findings, I found that Pilot Gutierrez probably filed an IFR flight plan based on information available to him at Guerrero Negro.

Taylor's opinion that the pilot attempted an approach to runway 09 under zero visibility rested upon his belief that the pilot received information that zero visibility existed at Tijuana airport at the time the pilot made his first contact with the Tijuana air controller, some 50 miles away from the airport.

According to Taylor, he was able to make out on the tape, YYY, the Spanish words for zero visibility. The tape itself was obtained from Plaintiffs' attorney, Robin Foor after Robert Griscom requested a copy.

According to Griscom, he was told by Foor, and I quote, "It's the best we have."

Tape, Exhibit YYY, was transcribed and, upon examination of the transcript, Exhibit WW by qualified interpreters and following an evidentiary hearing was received into evidence as having been sufficiently authenticated and reliable.

(66) Taylor statement that the words "zero visibility" appear on the tape is not supported by the evidence. I find that the section of the tape where Taylor is said to have the words "zero visibility" is too garbled to understand on both the enhanced and unenhanced versions.

Several expert translators retained by the parties have been unable to discern the Spanish phrase for "zero visibility" on either tape. Those words are not on the tapes.

(67) At trial, Plaintiffs offered another version of a transcript, sometimes referred to as the "SENEAM" transcript. That transcript does contain a communication from the air controller to the pilot of XAKOA that Tijuana has zero

visibility. Gaytan was able to examine some of the records during his investigation into the pilot's qualifications and the maintenance and inspection of Aviones air taxi operations. But when Gaytan requested the file relating to the official investigation of the crash of XAKOA by the Mexican government, the records were withheld from him by the agency having custody of the documents.

But Gaytan had reviewed the transcript designated as identification 13, referred to as the "SENEAM" transcript after it had been provided to Defense Counsel by Plaintiffs several days before Gaytan's deposition of January 31, 1992.

Gaytan was unable to authenticate the transcript as a part of the official record of the investigation by Mexican authorities into the accident, nor was he able to obtain access to the original tape of the communications between the air controller at Tijuana airport and the pilot of XAKOA shortly before the accident.

While he said at his deposition that the air controller at Tijuana airport had provided the pilot with weather information and received information that the field was closed, Gaytan explained at trial that those statements were entirely based upon his review of the "SENEAM" transcript.

(68) After Gaytan examined the transcript, Exhibit WW, prepared from the tape, Exhibit YYY, furnished by Plaintiffs' counsel, Gaytan changed the opinion expressed by him at the deposition and believed at the time he testified during the trial that the air controller did not inform Pilot Gutierrez of weather conditions at Tijuana or that the airport was closed.

Although Gaytan has attempted to obtain additional information relating to the recorded conversations from the government agencies in Mexico, he has been unable to do so.

Following an evidentiary hearing, I found that the "SENEAM" transcript had not been sufficiently authenticated to be received into evidence, and it has not been made an exhibit.

(69) There are other reasons which render it improbable that Pilot Gutierrez attempted an approach to runway 09 believing that visibility was zero. According to transcript WW, the controller mentions minimum conditions at the airport,

saying, quote:

> "Okay, then...uh...the attempt... uh...where it would adapt better to the minimums is to the ILS to the runway 09 with calm wind. Uh... considering this continue on radial 144 to execute the arrival codified as Avena two and the ILS to the runway zero nine."

(70) Earlier, after having been told by the controller that the airfield was restricted to all operations, Pilot Gutierrez inquired if the field is closed due to fog with winds. The controller responds, quote:

> "Uh...no, not closed, gentlemen. The airport is restricted to all type of operations because it's [garbled]."

(71) The pilot, Raul Gutierrez Tellez, then indicated his willingness to proceed to Tecate and at that point the controller offered Pilot Gutierrez the opportunity to make an attempt with the controller's assistance.

(72) At the time that Gutierrez in XAKOA began an approach to runway 09 at Tijuana airport, the pilot had not been informed that the visibility on the runways was zero nor that the field was closed to all operations, but rather the controller, based on existing weather conditions, informed the pilot that an ILS approach to runway 09 could be attempted.

(73) Upon reviewing transcript, Exhibit WW, Gaytan reached the opinion that the approach of XAKOA was a radar approach under regulations, Sections 3.1 through 3.1.6.1 of Part III of the regulations for air traffic (Mexico).

According to the regulations, a radar approach may be provided to any pilot who makes such a request regardless of weather conditions or to any aircraft in an emergency or in danger or to expedite traffic. Section 3.1.2.

However, a radar approach does not exempt the pilot

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from compliance with weather minimums prescribed for the airport. Section 3.1.2.1.

In the event of a radar approach, the controller is required to provide an altimeter check, ceiling and visibility information when the reported ceiling is under 1,500 feet and visibility is less than five miles.

Although Gaytan describes the approach of XAKOA as a radar approach to runway 09, when closely questioned, Gaytan explained that the pilot of XAKOA began on a radar approach to the localizer. But when the pilot captured the localizer, he then began an ILS approach to the runway.

According to Section 3.2.5, Part III of the regulations for air traffic (Mexico), during final descent to the airport under a radar approach, the pilot shall be informed of the distance of the aircraft from the head of the runway and the recommended altitude at each nautical mile of final approach. Section 3.2.5(b).

The pilot is required to notify the controller when he sees the runway or the approach lights. Section 3.2.5(c).

But if the approach is conducted under IFR conditions and the pilot has not given notice that he has the runway or lights in sight when he has reached one nautical mile from the head of the runway, the controller shall instruct the pilot implement a failed approach. Section 3.2.5(b).

(74) Under the regulations for air traffic (Mexico), if a pilot undertakes an approach, the controller may not prohibit the approach, but it always remains the pilot's duty to control the aircraft in a safe manner.

If the pilot undertakes an ILS approach to a runway, it is the pilot's responsibility to execute the approach in a safe manner and in full accordance with the regulations or to execute a failed approach.

(75) Griscom testified that he was unable to form an opinion on whether pilot negligence was a contributing cause of the accident. That is so, he stated, because the failure of the NTSB to document and secure the wreckage of the aircraft brought about the loss of critical information necessary to a

determination of whether the accident was caused by structural, mechanical or instrument failure of the aircraft.

According to Griscom, the best evidence would be the wreckage and, without that, there could be no actual determination what caused XAKOA to descend below the glide path and into contact with the terrain. Among the possibilities that might have been considered, according to Griscom's opinion, is induction system icing resulting in impaired engine performance while the pilot was making an attempt to execute a failed approach.

(76) Griscom also expressed an opinion that the actions and conduct of the air controller was a substantial factor in bringing about the accident. Griscom suggested that, had the air controller cleared Pilot Gutierrez to an alternate field at Mexicali, no accident would have happened. However, according to Griscom, not only did the air controller refuse to grant the pilot clearance to alternate airports when requested by the pilot, but the air controller failed to provide the required visibility or ceiling information, did not declare a failed approach when required to do so and actually took command of the approach and required the pilot to make the approach, misleading the pilot into believing that he was on a radar surveillance to runway 09.

I find Griscom's opinion concerning the pilot's approach to runway 09 and his evaluation of the air controller's actions to be contrary to the underlying evidence.

(77) Transcript, Exhibit WW, does include conversations between the pilot and the controller relating to alternate airports. After the controller informed Pilot Gutierrez that airport operations were restricted to all types of operation at Tijuana airport, the pilot suggested proceeding to Mexicali.

The controller then suggested Tecate, and at that point the pilot responded that he was going to see if he could make it to Tecate.

A moment later, the controller instructed the pilot to activate 1205 (a frequency) for identification on the radar.

After obtaining XAKOA on radar, the controller

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provided the pilot with a fix of XAKOA's position and offered to provide assistance if the pilot should desire to make an attempt to Tijuana airport.

Minimum visibility to runway 09 was three quarters of a mile. The pilot took a reading on the aircraft's DME and decided to attempt an approach, telling the controller, quote, "We'll see if we can make one attempt."

(78) I find that the controller in this instance did not refuse Pilot Gutierrez clearance to an alternate airport, but instead offered to assist the pilot in the event that the pilot wished to make an attempt at Tijuana airport. The pilot at that point decided to make an attempt.

The controller then provided information to the pilot with the best approach to the airport in view of the restricted condition. He advised the pilot under the conditions an ILS approach to runway 09 was best and provided the pilot with a designated approach or a pattern to bring the aircraft to point Alba at the proper altitude of 2,500 feet. See Exhibit XXX.

The pilot confirmed the indicated approach and, at the request of the controller, announced the aircraft's altitude at the time.

Shortly thereafter, the pilot reported a failure of the DME and requested clearance for Tecate. The controller responded, and I quote,

> "I have you now on radar contact. If you wish, I can give you vectors to the localizer so you can make the attempt."

The pilot then declared his intention that he would continue the approach informing the controller, quote, "Okay, if it's possible." I find that the pilot, having informed the controller of the failure of the DME, was then told by the controller that he would provide assistance to bring the aircraft to the localizer if the pilot wished.

The pilot chose this option and decided to proceed with the attempt. The air controller provided the pilot with a vector

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to the localizer and provided the pilot with information to the correct altitude. But the air controller also provided the pilot with instructions in the event of missed approach and in that event a clearance for Tecate.

(79) The evidence in transcript, Exhibit WW, indicates that the controller did not take command of the approach; rather, he provided assistance to the pilot and it was the pilot who made the decisions to undertake and to continue the approach. Moreover, the controller provided the pilot with instructions should the pilot decide to execute a failed approach and to continue on to Tecate.

(80) The controller continued to assist the pilot to point Alba and approve descent of XAKOA below 2,500 feet upon crossing Alba. The controller informed the pilot when the aircraft was three and a half miles from the head of the runway.

The pilot promptly responded indicating that the altitude of the aircraft was 1,200 feet.

At that point, the controller informed the pilot that the runway and approach lights were on. Finally, the controller informed the pilot that the aircraft was two miles out and the pilot promptly acknowledged receiving that information.

(81) At 7:56 a.m., XAKOA impacted on the hillside in line with the approach to runway 09 and all aboard the flight were instantly killed. Transcript, Exhibit WW, does not indicate a radar-controlled approach, but rather, because of the aircraft's DME failure, that the controller provided the pilot with information relating to distance from the runway not otherwise available to the pilot.

(82) Jack Jaax, pilot expert and air charter operator has experience in both the United States and in Mexico for over 25 years and has accumulated 25,000 hours of flight time. He is fluent in Spanish and has landed at Tijuana airport many times.

In his opinion, Pilot Gutierrez was making an ILS approach to runway 09 with surveillance radar assistance. The proper glide slope on an ILS approach enables a safe path to landing.

Upon intersecting the localizer, an ILS approach

provides the pilot with a radio signal as the aircraft follows the localizer along the flight path.

If the pilot deviates from the center line of the runway, the instrument indicates the deviation, permitting the pilot to correct his approach. If the pilot descends below the glide path, the deviation is indicated on the instrument so that the pilot may correct to a proper altitude.

A pilot executing an ILS approach must make a decision at the prescribed altitude for that airport either to continue the approach if the runway becomes visible or to execute a missed approach if the pilot at the prescribed altitude is unable to see the runway.

At Tijuana airport, the prescribed altitude to execute a missed approach is 786 feet above sea level which is 300 feet above runway 09.

(83) Although the air controller controls aircraft traffic within restricted zones and in the vicinity of airports, the pilot in command of an aircraft retains control over the aircraft in flight. If a pilot is given clearance to execute an approach to an airport, he is not required to make the approach.

I have earlier noted that the controller at Tijuana airport informed Pilot Gutierrez that in the case of a missed approach he was to ascend via radial two four zero, over the cap and continue on to Tecate.

(84) In Taylor's opinion, Pilot Gutierrez was not executing a radar surveillance approach to runway 09 because the controller did not provide the pilot with instructions to correct course or of altitude deviations as would necessarily be done on a radar surveillance approach.

Taylor expressed an opinion that, consistent with an ILS approach, the controller provided the pilot with vectors to intersect the localizer and inform the pilot of distances out from the runway because of the failure of the aircraft DME.

(85) Both Jack Jaax and Richard Taylor agreed in their opinions that Pilot Gutierrez descended below the proper glide path during their approach to runway 09 and failed to execute a missed approach when required to do so.

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Jaax and Taylor also agree in their opinions that Pilot Gutierrez' failure to properly follow the glide path and to execute a missed approach at the prescribed altitude contributed to cause the accident.

(86) I find that Pilot Gutierrez was making an ILS approach to runway 09 on the morning of September 30, 1987. He was not misled by the controller into believing that the approach was a radar surveillance approach.

During the approach, Pilot Gutierrez descended below the proper glide path and did not execute a missed approach when required to do so at the designated altitude of 786 feet above mean sea level at Tijuana airport.

(87) Robert Griscom has expressed an opinion that the failure of the NTSB to document and secure the wreckage of XAKOA precludes any determination of whether the cause of the accident was due to structural, mechanical or instrument failure.

(88) William Ross qualified as an expert aircraft accident investigator. He arrived at the site of the accident between 8:30 a.m. and 9:00 a.m. on October 1st.

After examining the scene, Ross determined that the aircraft impacted on a ridge running uphill. The left wing-tip tank impacted the terrain first. The aircraft continued for a short distance rotating toward the left. The propellers and engines impacted next leaving bits of wreckage strewn on the hillside.

The main part of the fuselage and wings impacted and then tumbled down the ridge and partially up a slope. The fuselage came to rest on the wings which had become detached following impact, but the right wing was to the left side of the fuselage and the left wing to the right side.

Ross expressed an opinion that, at the point of impact, the aircraft was traveling at a speed of 120 to 160 knots. Ross examined numerous photographs which had been taken on September 30th before removal of the wreckage from the site.

At the time of impact, landing gear on the aircraft was up.

Inspection of the photographs revealed that the exhausts were hot at time of impact; the impeller blades on the turbochargers indicated both engines were operating.

Propeller blades and propeller hubs shown in the photographs indicate that both engines were operating at power settings when impact occurred.

Ross found no evidence of engine failure or other defect in the aircraft.

(89) Michael Grimes, an accident reconstructionist employed by Teledyne, testified that his inability to examine the engines precluded him from determining whether the engines were operable at the time, and removal of the wreckage impeded his ability to determine the cause of the accident. I have considerable doubt whether he made an effort to determine the condition of the engines at the time of the accident or to undertake any investigation into its causes.

Ross readily conceded that the removal of wreckage during the night of September 30th and before 8:30 a.m. October 1st hampered his investigation and determination of the cause of the accident.

(90) However, Ross found enough evidence in his examination of the site that he was satisfied with his opinions, and most of the questions which he had entertained were resolved.

In his opinion, the engines revealed signs of power and high rotation. William Ross was a reliable and credible witness, and I find that the accident of September 30th was not caused by engine defect or failure.

(91) Nor do I find any probability of structural defect since winds were calm at Tijuana airport and the vicinity was shrouded with fog.

The pilot reported the aircraft DME not functioning, but there's nothing in the evidence otherwise indicating instrument malfunction.

(92) Nor is there anything in the pilot's communication with the air controller to indicate engine malfunction. To the contrary, the pilot indicated his readiness to proceed to an

alternate airport while he was well into the approach of runway 09 at Tijuana airport. The inference is that the aircraft was not malfunctioning or was operating on a low fuel state.

(93) I find, based upon all the evidence, the probable cause of the accident to be negligence on the part of Raul Gutierrez Tellez who, as pilot of XAKOA, descended below the proper glide path while making an ILS approach to runway 09, Tijuana airport, on the morning of September 30, 1987.

I find that the pilot failed to execute a missed approach as required when the aircraft reached the designated altitude of 786 feet above mean sea level at Tijuana airport.

Both of these errors on the part of the pilot amounted to negligence and both caused and together contributed to cause the accident and to the death of the passengers and the pilot on September 30th, 1987.

CONCLUSIONS OF LAW ON LIABILITY

(94) California tort and contract law determines Exportadora's liability in this case. Schoenberg vs. Exportadora, 930 F.2d 777, 783-84 (9th Cir. 1991).

Plaintiffs have made a claim that the agreement between Exportadora and the decedents involved an implied contract for non-negligent transportation. Defendants argue that this claim is not properly at issue in this case.

By order dated November 9th, 1992, United States District Judge John S. Rhoades ruled that Plaintiffs' motion to amend the complaint for the sixth time was unnecessary because the amendment did not state new causes of action but merely different theories under the same causes of actions. Judge Rhoades ruled, and I quote,

> "Of the theories listed in the proposed sixth amended complaint, the only ground that is arguably new is that of implied contract. This approach, however, is merely one more theory for holding Defendants directly liable.

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> Additional discovery and amendment of the complaint is thus unnecessary, and the implied contract theory of liability may be addressed at trial at the discretion of the trial judge."

(95) At trial, I have allowed evidence having to do with negotiations and conduct of the parties relating to Plaintiffs' contract claims. The parties have fully briefed legal issues of implied contract in pretrial and post-trial briefs.

I conclude that the contract claims have properly been brought before the Court in this case and, if necessary, I would allow a motion to amend the complaint to conform to the proof.

(96) Plaintiffs may have suggested at some earlier time that Exportadora operated as a common carrier in transporting the decedents. But I conclude that Exportadora acted as a contract or corporate carrier held to a standard of ordinary care.

A common carrier under California law is, quote,

> "...one who offers to the general public to carry goods or person and is bound to accept anyone who tenders the price of carriage." Webster vs. Ebright, 3 Cal.App.4th 784 (1992).

A common carrier must exercise the utmost care towards passengers while a private or corporate carrier is held to an ordinary standard of care, Webster at 788; Cal.Civ.Code § 2100.

The universal offer of carriage and the limited power to reject qualified passengers distinguishes a common carrier from a contract or corporate carrier. While commercial airlines are generally common carriers, a flight school, which was not shown to undertake to carry all student aviators indifferently, was held not to be a common carrier, Dziura vs. California Aviation Service, Inc., 4 Cal.App.3d 191 (1970).

(97) Exportadora did not undertake to carry all persons indifferently to Guerrero Negro and back. Travel aboard the

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company airplane, the Westwind, was limited to company directors, officers or employees and their dependents and other passengers for whom permission had been granted by Exportadora. Included among these passengers were business visitors, vendors and other invitees.

I conclude that Exportadora did not operate as a common carrier in transporting the decedents.

An entity that operates a transportation system to support its primary business purpose has been held to an ordinary standard of care in the operation of that system, Brown vs. Feather River Lumber Company, 203 Cal. 493 (1928).

In Brown, the defendant, quote,

> "...was not a common carrier of passengers but had built and was operating from its logging camp to the main line a short railroad designed for use in its logging and lumber business." Brown at 497.

For clarity, I will refer to this type of carrier as a contract or corporate carrier. I conclude that Exportadora transported Doctor Sugimoto, Doctor Kodani and Mr. Omachi as a corporate carrier.

As the Ninth Circuit held in Schoenberg, quote:

> "Exportadora maintained a regular air-and-auto link between its San Diego and Guerrero Negro offices as part of its commercial operations." Schoenberg vs. Exportadora de Sal, 930 F.2d 777 (9th Cir. 1991).

(98) Normally, the air portion of the transportation link between Tijuana and Guerrero Negro utilized the Westwind. When the Westwind was not available for a scheduled flight, Exportadora entered into charter agreements with one of several licensed air taxi operators who provided an airplane and pilots for the charter.

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Exportadora employed Aviones de Sonora as an independent contractor to assist Exportadora in performing its duties as a corporate carrier in the present case. As corporate carrier, Exportadora had a duty to transport the passengers using ordinary care.

The admitted fact that Aviones normally operated as a Mexican common carrier is irrelevant to the determination of Exportadora's liability on its agreement with the Japanese decedents.

(99) Plaintiffs contend that California Civil Code § 2090 imposes a common carrier level of care on all categories of carriers until, quote,

> "...the passenger is restored to as favorable a position as before he commenced the carriage."

This interpretation of the statute would seem to suggest that the distinction between common and other carriers has no legal significance.

In any event, Webster vs. Ebright, 3 Cal.App.4th 784, 787 n.2 (1992) makes clear that § 2090 deals with the distinction between common carriers with reward and common carriers without reward. Section 2090 does not impose the standard of care required of common carriers upon Exportadora in the present case.

(100) Plaintiffs contend that Exportadora should be liable for the breach of an agreement for the non-negligent transportation of the decedents. I have made findings that an agreement exists between Exportadora and the decedents for round-trip transportation between San Diego and Guerrero Negro.

I now conclude a covenant of non-negligent transportation should be implied in the agreement, that this contractual agreement was non-delegable and that Exportadora has failed to properly discharge this obligation.

Under the majority rule, a passenger may sue a common carrier for injuries under the contractual theory for breach of an

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implied covenant of non-negligent transportation.

While I have found no California authorities directly on point, most jurisdictions do allow passengers to elect to sue a common carrier either for negligence in tort or for breach of a contractual obligation for non-negligent transportation, citing the Bracewell vs. Nicholson Air Services, Inc., 748 F.2d 1499 (11th Cir. 1984) (applying Georgia law); Calhoun vs. Greyhound Lines, Inc., 265 So.2d 18 (Fla. 1972); St. Michelle vs. Catania, 250 A.2d 874 (Md. 1969); Griffith vs. United Airlines, Inc., 203 A.2d 796 (Pa. 1964); Williams vs. Illinois Central Railroad, 229 S.W.2d 1 (Mo. 1950); Doughty vs. Maine Central Transportation Company, 39 A.2d 758 (Me. 1944).

England seems to follow the same rule, Protheroe vs. The Railway Executive, 1 K.B. 376 (England 1951).

New York allows such an election in the case of personal injury but not wrongful death, Kilberg vs. Northeast Airlines, Inc., 211 N.Y.S.2d 133 (N.Y. 1961).

Puerto Rican law does not allow a cause of action for breach of contract for non-negligent transportation, Ocasio-Juarbe vs. Eastern Airlines, Inc., 902 F.2d 117 (1st Cir. 1990) (question answered by certification to Supreme Court of Puerto Rico).

One court described it as, and I quote,

> "...elemental that a contract of a common carrier to transport a passenger to a given destination imposes on the carrier an obligation to transport the passenger to his destination in a reasonably safe manner." Heredia vs. Safeway Trails, Inc., 369 So.2d 418, 420 (Fla. App. 1979).

Corpus Juris Secondum takes an inconclusive view, and I quote,

> "A common carrier may be liable for injuries to its passengers not only on a tort theory but also

on a breach of contract theory. However, it has also been held that the carrier is liable only a tort theory and not on a breach of contract or breach of warranty theory." 13 C.J.S. Carriers, § 518 (1990).

(101) The only California case offered by the parties that discusses an implied contract for non-negligent transportation is Marshall vs. United Airlines, 35 Cal.App.3d 84 (1973).

Exportadora contends that Aviones acted as an independent contractor on behalf of Exportadora in providing transportation to the Japanese decedents. Exportadora argues that, under California law, there is rarely any basis upon which the principal may be held liable in tort, citing 2 Witkin, Summary of California Law, Agency and Employment, § 125.

Exportadora relies upon Marshall vs. United Airlines, 35 Cal.App. 3d 84 (1973) as establishing the rule that even a common carrier may not be held liable for the acts of its independent contractor.

(102) Plaintiffs suggest that Marshall may be distinguished under the facts of the present case. In Marshall, the claimant sought to hold United Airlines liable in damages for personal injuries suffered when she fell on an escalator in the public airport at San Francisco. Claimant had bought a round-trip ticket and was on her return from New York to Berkeley. She purchased her ticket from United. The ticket provided airline transportation for the return from New York to Berkeley. She was to change from United's flight in San Francisco to an SFO Airlines helicopter flight to Berkeley. While passing from the United area in a public airport on her way to the SFO helicopter facility, she took an escalator and was injured when she fell.

The California appellate court held that United's duty to the claimant after she disembarked from the aircraft was one of ordinary or reasonable care. However, United held no ownership or right or control or management of the property

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where claimant was injured.

The court then undertook to consider whether United had, by selling the ticket, including helicopter service between San Francisco and Berkeley, either expressly or impliedly contracted with the claimant to furnish non-negligent passage from New York until claimant's departure from the SFO helicopter facility at Berkeley.

The court was unable to find California authority on whether, under similar facts, an implied contract for non-negligent passage to the passenger's ultimate destination arises. But the court noted that elsewhere throughout the nation the rule seems to be well established.

Upon reviewing the authorities, the appellate court concluded that generally, in the absence of a special contract to the contrary, a carrier's responsibility is discharged by safe carriage over its own lines.

The mere sale of a through ticket over two or more connecting lines is not evidence of a joint contract between the two carriers sufficient to make one liable for the fault of the other.

However, the court went on to distinguish an earlier California case of Wheeler vs. S.F. & A. Railroad Company, 31 Cal. 46 (1866). That case held that, where several carriers combine their operations by mutual arrangements over all their lines upon one contract for a single price, each may be held liable over the entire distance.

The court in Marshall undertook to distinguish Wheeler concluding that United's agreement with the injured passenger provided only transportation to San Francisco and not beyond San Francisco to Berkeley.

(103) The present case is more like Wheeler. Exportadora agreed to transport the decedents round trip between San Diego and Guerrero Negro. The agreement did not separate the obligation into segments.

The Ninth Circuit in Schoenberg upheld Judge Irving's findings and stated, and I quote,

"...decedents did not make arrangements for legs of the trips separately." Schoenberg, 930 F.2d 781.

The evidence at trial has been consistent with Judge Irving's findings and the ruling of the Ninth Circuit.

(104) I conclude that Marshall must be distinguished on its facts. Exportadora agreed to transport the decedents round trip from San Diego to Guerrero Negro with return to San Diego. Exportadora substituted Aviones to undertake the return flight from Guerrero Negro to Tijuana only after Exportadora's aircraft, the Westwind, became unavailable.

The decedents were scheduled by Exportadora to make the flight aboard the Westwind, and the charter with Aviones amounted to nothing more than to provide Aviones as a substitute for the purpose of carrying out Exportadora's obligation to the decedents.

(105) I conclude California courts would follow the overwhelming rule and imply a covenant of non-negligent transportation in contracts of carriage between a common carrier and a passenger.

I recognize that a common carrier owes a duty of the highest degree of care. I have held that Exportadora had a duty to exercise ordinary or reasonable care toward the decedents in providing transportation on its corporate aircraft or on the Aviones aircraft which was substituted for the Westwind.

The implied covenant of non-negligent transportation should apply not only to contracts between common carriers and their passengers, but also to contracts between contract or corporate carriers and their passengers.

By its terms, the covenant only requires non-negligent transportation. The factual findings that I have made establish the cause of the accident to have been the pilot's negligence. The implied covenant of non-negligent transportation does nothing more than require a corporate carrier such as Exportadora to exercise ordinary and reasonable care for the safety of those who are accepted by Exportadora as passengers.

(106) An implied contractual duty of non-negligent transportation is not the same as an implied warranty of safe transportation. Courts uniformly hold that a carrier is not the insurer of the passenger's safety, Tolan vs. Era Helicopters, Inc., 699 P.2d 1265 (Alaska 1985); Hunt vs. Sun Valley Company, Inc., 561 F.2d 744 (9th Cir. 1977) (applying Idaho law).

There is no implied warranty of safe passage which would be breached even in the absence of negligence. 132 C.J.S. Carriers § 518 (1990).

Negligence remains the essence of both tort and contract theories of recovery.

(107) Under California law, one who voluntarily assumes a contractual duty agrees to carry out the duty in a reasonable manner. California Civil Code Section 1655 implies in a contract any term, quote,

> "...necessary to make a contract reasonable or conformable to usage."

In interpreting this section, California precedent has split between a strict test limiting the judicial creation of implied contract terms and a liberal test generally allowing such terms.

The modern trend seems to be toward the liberal test. See 1 Witkin, Summary of California Law, § 739-41 (9th ed. 1987).

However, even under the strict test established in Cousins Investment Company vs. Hastings Clothing Company, 45 Cal.App.2d 141 (1941), I conclude that a covenant of non-negligent transportation should be implied in the agreement of round-trip transportation made between Exportadora and the decedents in this case.

Using the five-part strict test established in Cousins, I conclude that such a covenant: (1) is indispensable to effectuate the intention of the parties; (2) was clearly within the contemplation of the parties; (3) can be justified on the grounds of legal necessity; (4) would have been made by the parties if

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attention had been called to it; and (5) is not completely covered by the contract.

(108) While contract or corporate carriers are not the insurers of their passengers' safety, I conclude that the agreement includes a covenant to transport the passengers in a reasonable and non-negligent manner.

This implied covenant is necessary to make the agreement reasonable and conforms to the usage and expectations of the parties.

(109) Under California law, a party to a contract cannot escape liability by delegating performance of contractual duties to an independent contractor, 1 Witkin, Summary of California Law, § 943 (1987). I quote:

> "[A] person who has assumed the contractual duty to perform a service for another cannot escape his contractual obligation to perform the service in a competent manner by delegating performance to another." Harold A. Newman Company vs. Nero, 31 Cal.App.3d 490 at 496 (1973).

This general rule on the non-delegability of contractual duties applies to the negligent performance by an independent contractor, quote:

> "One who contracts to perform an undertaking is liable to his promisee for the negligence of an independent contractor whom he delegates actual performance." Citing Capital Chevrolet Company vs. Lawrence Warehouse Company, 227 F.2d 169 (9th Cir. 1955).

If the promisee wants to be relieved of her obligation, she must gain the promisor's agreement to a modification. Unilateral action by the promisee is not generally sufficient to relieve her of contractual duties.

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(110) I conclude that the evidence fails to reveal any modification of the agreement for accommodations in transportation between Exportadora and the decedents. At no time were the passengers told that Exportadora would not have responsibility for their transportation back to San Diego.

At no time did any of the passengers agree to a modification of the agreement. Although they were introduced to a new pilot and observed the Aviones airplane, the passengers had no reason to believe that Exportadora had been relieved of responsibility for their transportation.

Exportadora employees or agents had met them in San Diego, arranged for accommodations in San Diego, carried them by van to Tijuana, flew them on the Westwind to Guerrero Negro, provided their accommodations at Guerrero Negro, introduced them to their new pilot, brought them to the Aviones airplane and arranged for an Exportadora van to be waiting in Tijuana to carry them to San Diego.

Nothing indicates that the passengers had anything to do with any arrangements for their travel and accommodations.

The agreement between Exportadora and the Japanese decedents was not modified, and the passengers continued to rely upon Exportadora to carry them safely to San Diego on their return from Guerrero Negro.

Exportadora was free to choose the vehicles, drivers or independent contractors it considered most appropriate to carry out its obligations under the agreement.

I conclude that Exportadora's choice of carriers did nothing to change its obligation of non-negligent transportation to the decedents.

(111) I conclude that Exportadora had a non-delegable obligation to transport Doctor Sugimoto, Doctor Kodani and Mr. Omachi in a reasonable and non-negligent manner. On the trip from San Diego to Guerrero Negro, Exportadora provided its company van and the company airplane, the Westwind.

On the return trip, Exportadora used a Cessna 340A chartered from Aviones de Sonora, an independent contractor, and planned to use the company van. Exportadora had the same

obligation in transporting the decedents from Guerrero Negro to San Diego as it had in transporting them from San Diego to Guerrero Negro: to see that the passengers were transported with reasonable care.

(112) Plaintiffs contend that Exportadora had a non-delegable tort duty toward the decedents. I reject Plaintiffs' arguments based on the peculiar risk doctrine but conclude that Exportadora had a non-delegable tort duty based on public policy grounds.

In California, the general rule of non-delegability for the negligence of an independent contractor is, quote,

> "...subject to exceptions of such wide scope that they leave only a small area in which the so-called general rule operates. Accordingly, it seems proper to say that non-liability is now the exception [and] the so-called general rule is followed only where no good reason is found for departing from it... Considerations of policy frequently call for such departure." 6 Witkin, Summary of California Law, § 1009 (1987).

(113) The Plaintiff contends that Exportadora had a non-delegable tort duty toward the passengers of XAKOA and is therefore liable for any negligence by Aviones de Sonora.

California courts find non-delegable tort duties in three specific categories: public franchise, statutory duty and peculiar risk. In addition, California courts may find a non-delegable tort duty in other areas based on public policy criteria.

The present case does not fall neatly into either of the three specific considerations. See Rozmajzl vs. Northland Greyhound Lines, 49 N.W.2d 501 (Iowa 1951) (public franchise); Maloney vs. Rath, 69 Cal.2d 442 (1968) (statutory duty).

The fact that a particular category of non-delegable duty does not apply does not preclude the Court from resting its conclusion on public policy grounds. Alaska Airlines, Inc. vs.

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Sweat, 568 P.2d 916 (Alaska 1977) (court rejects liability under Restatement (Second) of Torts § 428, but finds non-delegable tort duty based on policy considerations).

(114) The "peculiar risk" exception to the general rule that the defendant is not liable for the acts of an independent contractor is codified in Sections 413 and 416 of the Restatement (Second) of Torts. These provisions impose a duty to take "special precautions" when a defendant should know that an activity holds a "peculiar risk" of physical harm to others.

Section 413 imposes a direct duty on the defendant, which the defendant can delegate to the independent contractor. Section 416 imposes a vicarious, non-delegable duty on the defendant to take special precautions.

Together, these provisions hold a defendant liable for failure to take special precautions against peculiar risks, and the contractual delegation of the peculiar risk to the independent contractor serves only as a legal basis to obtain an indemnity from the independent contractor. See § 416, comment c.

The definitions of both "peculiar risk" and "special precaution" are identical for the two sections. See § 416, comment b.

California has adopted the Restatement in this area, Castro vs. State of California, 114 Cal.App.3d 503 at 510 (1981). Quote:

> "Whether the particular work which the independent contractor has been hired to perform is likely to create a peculiar risk of harm to others unless special precautions are taken is ordinarily a question of fact."

(115) Liability under the peculiar risk theory requires: (1) that the activity create a peculiar risk of harm unless special precautions are taken; and (2) that the defendant knew or should have known of the peculiar risk, Hughes vs. Atlantic Pacific Construction Company, 194 Cal.App.3d 987 at 998 (1987).

The general risk that an independent contractor might be

negligent in performing activity is not a peculiar one. To impose liability, the risk must be, quote:

> "...peculiar to the work to be done and arising out of its character or out of the place where it is to be done." See § 413 Restatement, comment b.

To be peculiar, the risk does not have to "necessarily and inevitably" arise but can be one likely to arise from the activity. See § 416, comment e.

> "'Peculiar' does not mean that the risk must be one which is abnormal to the type of work to be done or that it must be an abnormally great risk. It has reference only to a special recognizable danger arising out of the work itself." Restatement (Second) of Torts, § 413, comment b.

(116) The California Supreme Court has suggested that "special risk" is a more appropriate term, Aceves vs. Regal Pale Brewing Company, 24 Cal.3d 502 at 509, n. 2 (1979).

> "Where it is the manner in which a subcontractor performs the work as opposed to the work itself that introduces the danger to an otherwise safe activity and work place, the contractor is not vicariously liable." Ek vs. Herrington, 738 F.Supp. 357 (D.C. Idaho 1990).

Negligence by the independent contractor in performing the activity is sometimes referred to as "collateral" or "casual" negligence which does not trigger liability under the peculiar risk theory.

(117) One state appellate court has applied §§ 413 and 416 to aircraft case, Fagundes vs. State, 774 P.2d 343 (Idaho

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App. 1989). In that case, the State of Idaho contracted with a helicopter firm to fly state employees over park areas to count game. The helicopter crashed and the pilot, an employee of the contractor, was killed. The court rejected peculiar risk liability on two independent grounds.

The court found that, under Idaho law, a defendant did not owe a duty to the employee of an independent contractor. The court based its ruling on the perceived unfairness of worker's compensation law limiting the liability of the independent contractor but not that of the defendant general contractor.

California takes the opposite view. In California, the law is clear, quote,

> "...that an employee of an independent contractor... may sue the contractor's employer under the peculiar risk doctrine." Castro vs. State of California, 114 Cal.App.3d 503 at 514 (1981).

To the extent that the Fagundes decision was based on the fact that the plaintiff was the employee of the independent contractor, the decision does not apply to the present case. However, the court rested its decision on the alternate grounds that the danger of a helicopter crash in the wilderness was not a special risk in a contract for transportation by helicopter over wilderness areas.

(118) In the present case, Plaintiffs have the burden of proving a special risk in the flight from Guerrero Negro to Tijuana beyond the generally recognized dangers of air travel itself.

I conclude that the risk that a plane might crash through pilot error is a type of "collateral" risk outside the scope of the special risk doctrine.

The fact that fog at Tijuana might have been foreseeable to Exportadora or to Pilot Raul Gutierrez Tellez does not change this result. As the transcript of the conversation between the

pilot and the air controller indicates, the pilot knew that he had the option to execute a missed approach at any time. It was not a special risk that the pilot would deviate from the glide path or an ILS approach to the airport or fail to execute the required missed approach that caused this accident.

(119) As I have earlier suggested, Alaska Airlines, Inc. vs. Sweat, 568 P.2d 916 (Alaska 1977) holds that, in addition to the specific categories of non-delegable tort duties, a non-delegable duty may be found on general policy grounds.

Plaintiffs argue that Exportadora controlled the flight and is responsible for its departure under adverse weather conditions.

I have found that Exportadora scheduled the flight but that the conduct of the flight was under the control of the Aviones pilot, Raul Gutierrez Tellez. The decision to undertake the flight, how the flight would be conducted and whether under the restricted conditions a landing at Tijuana airport should be attempted rested with the pilot, not with Exportadora.

I have found that Aviones was an independent contractor under its charter with Exportadora. However, as Alaska Airlines vs. Sweat holds, a party may be liable for the negligence of an independent contractor if public policy requires that a non-delegable tort duty exists. California authorities suggest a number of factors to consider in determining if a non-delegable tort duty exists on the facts of a specific case, and I quote:

> "Some of the principal ones are that the enterprise, notwithstanding the employment of the independent contractor, remains the employer's because he is the party primarily to be benefited by it, that he selects the contractor, is free to insist upon one who is financially responsible and to demand indemnity from him, that the insurance necessary to distribute the risk is properly a cost of the employer's business and that the performance of the duty of care is of

great importance to the public." Van Arsdale vs. Hollinger, 68 Cal.2d 245 at 253 (1968).

(120) In the present case, Exportadora enjoyed the primary benefit of the transportation of the decedents. Mr. Omachi was the representative of a major purchaser of Exportadora's salt and the transportation of professors, Doctor Sugimoto and Doctor Kodani was arranged at the request of Mitsubishi, a major stockholder.

Exportadora could use any vehicles which suited its purpose, including the company van, the company plane or air taxi companies.

On those occasions when Exportadora elected to use an air taxi company, Exportadora was free to use only financially responsible companies or require indemnity. Exportadora was better situated to analyze the amount and risks of the transportation it was providing to determine the appropriate level of insurance coverage.

Exportadora was in a better position to balance the risks involved against the benefits it gained in continuing to provide transportation to potential customers and other guests.

Finally, imposing a non-delegable duty of care on a corporation that operates a regular transportation link assures, quote,

> "...that, when a negligently caused harm occurs, the injured party will be compensated by the person whose activity caused the harm and who may therefore properly be held liable for the negligence of his agent, whether his agent was an employee or an independent contractor." Maloney vs. Rath, 69 Cal.2d 442 at 446 (1968).

Based on the foregoing public policy factors, I conclude that Exportadora had a non-delegable duty of ordinary care in the transportation of the decedents under California law.

(121) Plaintiffs suggest that, in the transportation

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industry, a carrier may not delegate its duty to transport passengers safely. In support of that contention, Plaintiffs cite Alaska Airlines vs. Sweat, 568 F.2d 916 (Alaska 1977). In the Sweat case, the plaintiff purchased a ticket from Alaska Airlines to fly from Cordova to Cape Yakataga, Alaska. Alaska Airlines, a common air carrier, had previously hired Chitina Air, an air taxi company, to service a number of the airline's smaller routes, including the flight from Cordova to Cape Yakataga. Quote:

> "There is not indication that Alaska Airlines controls the maintenance of the planes, the hiring of pilots or the day-to-day affairs of Chitina. However, Alaska Airlines provides the schedule, the tickets and rates, and Chitina then charges Alaska Airlines an hourly rate." Sweat at 922.

(122) Plaintiff in Alaska Airlines vs. Sweat was seriously injured when the aircraft encountered zero visibility conditions and crashed into the Bering Glacier. Although Sweat discusses the important responsibility a certificated common carrier has for the safety of its passengers, I conclude that much of the rationale of Sweat should apply to the facts of the present case.

In both instances, the air taxi company operated as an independent contractor with the ultimate responsibility for pilot qualifications and aircraft maintenance.

In both instances, however, the passenger made an agreement with the defendants that the defendant would transport them.

I conclude that Sweat provides additional support for the conclusion that Exportadora as a corporate carrier had a non-delegable tort duty toward its scheduled passengers.

(123) Plaintiffs argue that Exportadora should be liable for the negligence of Pilot Gutierrez on a theory of apparent or ostensible agency. An ostensible agency is established, quote,

> "...when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent." Cal. Civ. Code § 2300.

The principal is liable to persons who reasonably rely on the ostensible agency to their detriment. Cal. Civ. Code § 2334.

Ostensible agency and agency by estoppel are identical legal concepts, 2 Witkin, Summary of California Law, § 40 (9th ed. 1987).

Despite these statutes, Exportadora, quote:

> "...respectfully submits that... the 'estoppel to deny agency theory' [has] absolutely no binding effect under the law of the State of California."

Exportadora cites Professor Witkin's treatise for the proposition that a principal is rarely liable for the torts of an ostensible agent. However, the very next sentence in Professor Witkin's treatise clarifies that this is because, quote,

> "...the essential element of reliance upon the representations of conduct of the principal is usually lacking." 2 Witkin, Summary of California Law, § 125 (9th ed. 1987).

Where such a reliance is shown, the principal is liable to the injured party under clearly established California law.

(124) In Croce vs. Bromley Corporation, 623 F.2d 1084 (5th Cir. 1980), Mustang Aviation, a common carrier, agreed to transport the Jim Croce Group to various concert locations. When Mustang's plane was unavailable, Mustang arranged for Roberts Airways to provide a replacement plane and pilot. When the plane crashed due to pilot negligence, Mustang was held liable on a theory of agency by estoppel. The Court of Appeals upheld the District Court findings, quote:

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"...there is no credible evidence that [Mustang] informed the Croce Group that Roberts was the owner and operator of the substitute or that Roberts was solely responsible for the flight, nor did anyone secure the Croce Group's agreement to the change from the original contract. While the evidence on this point is sparse, the reasonable inferences from the evidence left the court with the firm belief that no such communication occurred.

No one in the Croce Group knew or should have known Mustang was not responsible for the flight or that Roberts was flying it in Mustang's place." See Croce at 1088.

(125) In Roberts vs. Gonzalez, 495 F.Supp. 1310 (D.C.V.I. 1980), Caribbean Executive Airlines, a common carrier, agreed to transport the plaintiffs round trip between San Juan and St. Thomas. Ground transportation between the airport and midtown was provided in both locations.

When Caribbean's plane was unavailable, Caribbean arranged for Conquest Airways to transport the plaintiffs by air. Caribbean retained the responsibility for ground transportation.

The plane crashed due to engine malfunction and pilot error in responding to the malfunction. Caribbean was held liable on a theory of agency by estoppel. The court found numerous manifestations by Caribbean, the principal, to the passengers that Conquest was its agent.

"Among those manifestations is the total absence of dealings with Conquest by the passengers. Instead, their transfer was conducted entirely by Caribbean officials and therefore left the impression that they were still Caribbean's passengers. A similar conclusion is inferable from the fact that the Conquest flight was an

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> unscheduled flight for the Caribbean passengers alone. This perspective was also reinforced by Caribbean's retention of the responsibility for the passengers' ground transportation in San Juan and St. Thomas. A final manifestation of apparent authority was the fact that the passengers were permitted to retain their Caribbean tickets and to utilize them on the Conquest flight." See Roberts, 1314-15.

(126) In the present case, Exportadora agreed to transport the decedents round trip between San Diego and Guerrero Negro. Exportadora provided all of the decedents' accommodations in San Diego and Guerrero Negro. Exportadora provided ground transportation between San Diego and Tijuana.

On the flight from Tijuana to Guerrero Negro, Exportadora flew the decedents on separate flights of the Westwind. When the Westwind was unavailable for the return flight, Exportadora arranged for Aviones de Sonora to transport the five scheduled passengers.

Exportadora told the passengers the company van would be waiting for them in Tijuana to take them to San Diego.

While at least some of the passengers were introduced to the new Aviones pilot the night before the flight, all the scheduled passengers knew at some time before they boarded the flight that they would not be flying on the Westwind to Tijuana.

I conclude that the passengers were not informed that Aviones would be assuming Exportadora's obligations or responsibility for the flight.

All transportation and accommodations between San Diego and Guerrero Negro up to the flight of XAKOA from Guerrero Negro had been arranged by Exportadora. Exportadora continued to arrange transportation after the expected arrival of XAKOA in Tijuana.

I conclude that the conduct of Exportadora induced a reasonable belief in the passengers that Exportadora was

responsible of XAKOA from Guerrero Negro to Tijuana.

I conclude that the passengers relied on the continuing responsibility of Exportadora for their transportation by boarding the flight. These conclusions establish the required elements of ostensible agency under California law.

(127) Exportadora relies upon Marshall vs. United Airlines, 35 Cal.App.3d 84 (1973) to argue that a carrier's duty ends once the passenger has safely departed from the carrier's aircraft.

As I have noted, in Marshall the plaintiff attempted to hold United Airlines liable for the alleged negligent maintenance of an escalator in the San Francisco-Oakland airport. After disembarking from a United flight and walking down the airport corridors, the plaintiff fell and injured herself on the escalator.

The court held that United had no duty to maintain the escalator and had safely discharged its common carrier obligations toward the plaintiff.

Exportadora argues that its obligation toward the decedents ended when the decedents boarded the Aviones plane. I find Marshall distinguishable on the issue of ostensible agency. There was no allegation in Marshall that United's conduct or statements had led the plaintiff to believe that United was responsible for travel beyond its facility at San Francisco.

(128) Exportadora argues that, in order for the doctrine of ostensible agency to apply, passengers must pay money for their tickets and the defendant must be a common carrier. Although both Croce and Roberts involved common carriers, Exportadora has not offered any authority for the proposition that the doctrine of ostensible agency is so limited.

I have previously held that Exportadora gained valuable consideration for its transportation of the decedents including the possibility of increased sales of salt to Asahi Chemical and stockholder good will.

I conclude that Exportadora is liable for the negligence of the Aviones pilot, Raul Gutierrez Tellez, based on the theory of ostensible agency.

(129) Plaintiffs argue that the pilot negligence should be inferred under the doctrine of res ipsa loquitur. In California, the doctrine of res ipsa loquitur applies if the accident was: (1) the kind that ordinarily does not occur in the absence of negligence; (2) caused by an instrument in the exclusive control of the plaintiff; and (3) not caused by actions of the plaintiffs. Cal. Evid. Code § 646, Law Revision Comments (1970).

If a plaintiff establishes these three prerequisites and the defendant does not produce "evidence which would support a finding that [the defendant] was not negligent or that any negligence on [the defendant's] part was not a proximate cause of the occurrence," the trier of fact must find negligence. Cal. Evid. Code § 646(c).

If the defendant does not come forward with such rebuttal evidence, the trier of fact cannot find liability unless the trier finds, quote,

> "...that it is more probable than not that the occurrence was caused by some negligent conduct on the part of the defendant." Cal. Evid. Code § 646(c)(2).

A defendant cannot rebut a prima facie showing of res ipsa loquitur with mere speculation about possible alternate causes of the crash, Newing vs. Cheatham, 15 Cal.3d 351 at 365 (1975); Mittelman vs. Seifert, 17 Cal.App.3d 51 at 80 (1971). In more simple terminology, the doctrine allows an inference against the defendant based on unrebutted circumstantial evidence. Once this inference is rebutted, the trier of fact is required to weigh all of the evidence, circumstantial and direct, to reach a result.

(130) Plaintiffs cite numerous authorities holding an aviation common carrier to a higher evidentiary standard to rebut a passenger's prima facie showing of res ipsa loquitur, Irwin vs. Pacific Southwest Airlines, 133 Cal.App.3d 709 (1982); Roberts vs. Trans World Airlines, 225 Cal.App.2d 344 (1964); Colditz vs. Eastern Airlines, Inc., 329 F.2d 180 (5th

Cir. 1969).

I have previously held that Exportadora did not act as a common carrier in transporting the decedents, but rather as a corporate carrier under an analogy to the facts of Brown vs. Feather River Lumber. Such carriers are required to exercise ordinary care in the transportation of passengers.

Cases modifying the traditional res ipsa rules to reflect a common carrier's duty to exercise utmost care are inapplicable. In particular, I reject Plaintiffs' argument that an inference of negligence arises in this case from an injury to passengers. The decision in Foss vs. United States, 623 F.2d 104 (9th Cir. 1980) clearly holds that there is no presumption of pilot negligence from a crash under California law.

Like the trial court in Foss, I have based my rulings on the evidence produced at trial rather than an inference of presumption of negligence.

(131) In Newing vs. Cheatham, 15 Cal.3d 351 (1975), the California Supreme Court held that the doctrine of res ipsa loquitur applied as a matter of law to the crash of a private airplane near Tijuana, Mexico. The first condition was met because the plane took off in clear weather and there was, quote,

> "...no evidence that weather conditions contributed in any way to the crash of the plane." See Newing at 361.

The court distinguished cases in which natural conditions could have affected the operation of the aircraft. See Newing at 361, note 4.

The second factor was established as a matter of law because the pilot was in the exclusive control of the aircraft. There was no reason to suppose that any other person was operating or controlling the plane at the time of the accident, Newing at 362.

Plaintiffs argue that the decision in Newing establishes Exportadora's liability in the present case.

(132) I conclude that the present case is distinguishable from Newing. Unlike Newing, the evidence is certain that Tijuana airport was restricted due to low visibility when XAKOA approached runway 09. This is not a case of an accident that ordinarily does not occur in the absence of negligence.

At trial, there was conflicting evidence from qualified expert witnesses about the issue of pilot negligence and causation. The NTSB report was unable to conclude that pilot error caused the accident. These evidentiary disputes and the possible effect of low visibility effectively rebut the first prerequisites to the application of res ipsa loquitur to this case.

In addition, Exportadora has presented expert testimony that XAKOA was flying a radar surveillance approach and that such an approach places the air traffic controller in effective control of the aircraft.

While I have considered and ultimately rejected this opinion in light of all the evidence, it nevertheless served to effectively rebut Plaintiffs' showing on the second prerequisite to the application of res ipsa loquitur to this case.

Therefore, I am required by Section 646(c)(2) to reach a decision based on all of the evidence.

(133) Because Exportadora's expert witnesses effectively rebutted the first and second prerequisites to a prima facie showing of res ipsa loquitur, I do not express any opinion about the legal effect of Plaintiffs' previous allegations that a fuel leak in the engine of the Cessna 340A caused the accident or Exportadora's suggestion that air induction icing caused the accident. See Newing, 15 Cal.3d at 363. Dean Prosser has stated that, quote,

> "A res ipsa case is a circumstantial evidence case which permits the [trier of fact] to infer negligence from the mere occurrence of the accident itself. Its first requirement is a basis of past experience which will permit the triers of fact to conclude that such events do not

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ordinarily happen unless someone has been negligent." Prosser, Res Ipsa Loquitur in California, 37 Cal.L.Rev. 183 at 191 (1949).

(134) I conclude that the present case involves complex and specialized aviation issues beyond the ordinary experience of triers of fact. Resolution of liability required the type of expert opinion and detailed evidence presented at trial. Accordingly, I reject Plaintiffs' claim of res ipsa loquitur.

(135) Plaintiffs have urged this Court to find that Pilot Raul Gutierrez Tellez was negligent per se for alleged violations of the aviation laws of Mexico and the United States.

The Secretary of Transportation of the United States is authorized by law to regulate the navigable air space of the United States to ensure the safety of aircraft, 49 U.S.C. § 1348(a).

Mexican air safety laws and regulations apply to the operation of Mexican aircraft in Mexican air space under generally applicable ideas of national sovereignty. On the border, Tijuana and San Diego air traffic control operations have executed an agreement titled, "San Diego Tracon and Tijuana Approach Control Letter of Agreement" effective June 15, 1981. This agreement requires Tijuana air traffic control to notify San Diego air traffic control that an arriving airplane is using the instrument approach to Tijuana and may require San Diego to monitor the altitude of the airplane. However, Tijuana, not San Diego, directs all approaches to Tijuana airport.

I conclude that the letter agreement does not constitute an assertion of control over the aircraft making an instrument approach to Tijuana.

I conclude that the United States of America did not assert regulatory control over the flight of XAKOA from Guerrero Negro to Tijuana.

I conclude that the Via Generales safety regulations establish the appropriate applicable air safety law in the present case. The legal effect of a violation of the Via Generales is

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determined by California tort law. Under California law, violation of a safety regulation establishes negligence per se, Haft vs. Lone Palm Hotel, 3 Cal.3d 756 (1970). California Evidence Code Section 669(a) provides that, quote:

> "The failure of a person to exercise due care is presumed if: (1) He violated a statute, ordinance or regulation of a public entity; (2) The violation proximately caused death or injury to person or property; (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance or regulation was designed to prevent; and (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance or regulation was adopted."

Although the statute establishes only a presumption of negligence from a violation, the presumption can only be rebutted by evidence that the defendant was a child acting in a reasonable manner for his or her age and experience or that the violation of the statutory regulation was more reasonable than compliance with the statute. Cal. Evid. Code § 669.

(136) The Plaintiffs argue that a number of alleged statutory violations are negligence per se in this case. Even if proved, the alleged lack of a copilot, departure before sunrise and failure to gather all available information were not causes of this accident.

I have previously found that the pilot was qualified under Mexican aviation law to make the flight from Guerrero Negro to Tijuana, that the plane had all the required equipment to do so and that no copilot was required.

Plaintiffs have failed to carry their burden of proof on the question of whether XAKOA departed with sufficient fuel reserves and whether XAKOA departed Guerrero Negro with inadequate information on forecasts for less than minimum

conditions in Tijuana.

Plaintiffs contend that the failure to follow the glide slope and failure to execute a missed approach were negligence per se. Plaintiffs cite federal air regulations rather than the Via Generales for these propositions.

I find that the pilot's failure to follow the glide slope and execute a failed approach constitute negligence under the evidence and the credible expert testimony presented at trial.

The Plaintiff has failed to carry its burden of proof that these acts constituted negligence per se under the rule of the Via Generales.

FINDINGS OF FACT ON DAMAGES

(137) Doctor Katsuo Sugimoto and Doctor Yoshihito Kodani were professor on the faculty of Tottori University of Hamasaka, Japan at the time of their visit to Guerrero Negro in late September 1987. Mr. Omachi was the manager of raw materials for Asahi Chemical Industry Company. All of the decedents were married with families.

(138) Hiroko Sugimoto, who was born in Japan on April 27, 1931, became acquainted with her future husband, Doctor Sugimoto, while was a child of 3 or 4 years. He proposed to her when she was 17, and she married Doctor Sugimoto when she was 20. Mrs. Sugimoto testified that, while many marriages in Japan were arranged, she and her husband married for love. The couple had two children: the oldest son, Mitsukini, and the youngest, Yasunobo, with whom the widow Hiroko now lives.

(139) Doctor Sugimoto became employed at the ministry of agriculture in Japan when he was 22 years old. Through self-study he was able to obtain his Ph.D by 1973. During his work with the ministry of agriculture he was assigned to Malaysia for a two-year period from 1962 to 1964 and 1967 to 1969 and for a two-and-a-half-year period from 1980 to 1982. On these assignments he provided technical aid for the development of rice crops. Doctor Sugimoto was also

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away from home on assignment in Thailand for six months in 1973.

(140) After 35 years at the ministry of agriculture, Doctor Sugimoto in 1982 became a member of the faculty in the Department of Agriculture at Tottori University. For a number of years since 1982, Doctor Sugimoto has been connected with the agricultural project at Guerrero Negro.

(141) Doctor Sugimoto did not use tobacco. When asked whether he used alcohol, Mrs. Sugimoto responded that he did not, but later qualified her testimony stating that he drank on social occasions or holidays. He was careful with his diet since he had high blood pressure. He received surgical operations on two occasions. On one occasion his condition was described by Mrs. Sugimoto as benign. On the other occasion he received an operation for cataracts on his eyes.

(142) Hiroko Sugimoto suffers from high blood pressure for which she takes medicine. She received a surgical operation for a thyroid condition and she has a light case of diabetes. She does not use either tobacco or alcohol.

Mrs. Sugimoto was examined on January 8, 1993 by Doctor Bressler, a qualified internist who treats geriatric patients. Doctor Bressler reviewed Mrs. Sugimoto's medical records, examined her and had a number of laboratory tests performed on her. He reviewed medical literature bearing upon her condition. He found she is now 61 years of age and has chronic diseases that will affect her life expectancy including diabetes, hypertension and elevated cholesterol. In his expert opinion, she has a ten-year life expectancy. I find his testimony credible and reliable.

I find that Mrs. Sugimoto is in poor health, suffers from chronic diseases that will shorten her life expectancy and that, at the time of trial, she had a ten-year life expectancy.

(143) Hiroko Sugimoto testified that on three or four occasions her husband slapped her. Later, she qualified her testimony to say that on several occasions he "physically admonished" her. This, she testified, had to do with the manner in which she disciplined her sons. Doctor Sugimoto thought she

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was not strict enough.

For approximately 12 years, Doctor Sugimoto's parents resided with their son and daughter-in-law. They were in bad health and required a good deal of care from Mrs. Sugimoto. Much of her enjoyment in life came from raising the children and in their accomplishments.

Her husband drove a motor vehicle, took her shopping several times a week. Before his death, they went on walking or day trips approximately once a month. Both enjoyed working in the garden at their home in Ibaraki.

Doctor Sugimoto planned to remain a professor at Tottori University until he would be compelled to retire at the age of 65. He expressed interest upon retirement to return to Malaysia and work for perhaps five years but had no definite plans.

His hobby was to create tanka, a form of Japanese poetry. Indeed, Doctor Sugimoto published a book of poetry. At the time of his death in September 1987, Doctor Sugimoto was 61 years of age.

(144) Kimiko Kodani was born in Japan on May 4, 1935. She first met her future husband, Doctor Kodani, in 1947 and a marriage was arranged for the two of them. She found her husband to be very kind, jolly and well liked. She testified that he was a good person, generous to his wife and others.

Doctor Kodani and his wife had two daughters: Mayu, the oldest, and the second daughter, Kyoke. After the marriage, Doctor Kodani's parents moved in with their son and daughter-in-law. Doctor Kodani's father died nine years ago, but Mrs. Kodani continues to care for Doctor Kodani's mother who is now 81 years of age.

(145) Doctor Kodani was the oldest son in his family and during his life his home became a center for family gatherings which were happy events. Doctor Kodani's hobbies included golf and bicycling. He loved sports and he loved to sing.

(146) Doctor Kodani obtained a Ph.D in agriculture in 1977. He specialized in hydrology and irrigation research. He

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graduated from Tottori University in 1954 and became a member of the faculty as an assistant professor in 1977. He became well known for research in his field and made presentations at professional meetings. In 1980, he went to the United Arab Republic for one month to provide assistance. Doctor Kodani would have retired at 65 from his position as professor at Tottori University. He had nine years until retirement and had no specific plans of employment at that time. Her husband at the time of his death was 56 years of age. He had been in good health.

(147) Kimiko Kodani relied upon her husband for family support. However, she held several part-time jobs as a dressmaker and a nurse's aid. Her husband helped her at times with the household duties and set aside 10,000 yen per month from his salary into savings.

(148) Kimiko Kodani suffered depression and an attack of osteomyelitis following the death of her husband. She attributes her condition to the loss of her husband. Her sexual relations with her husband were enjoyable, and she continues to miss her husband's company and support.

(149) Kuniko Omachi married Hideo Omachi in 1985 and the couple had one child. Mrs. Omachi was employed by Tokyo Marine Fire Insurance, but after her marriage she relied on her husband for support.

Hideo Omachi was employed as section manager in the purchasing department of Asahi Chemical Industry, Limited, Japan's largest chemical company. In his position, Mr. Omachi was required to travel frequently to the Soviet Union, China, Europe and the United States and on the occasion of his death, September 30, 1987, to Mexico.

(150) Mr. Omachi was sociable, sincere and considerate. He liked to sing and at the university belonged to a mountaineering club. He became a golfer and on one occasion won a company tournament. But his dream was to become director of the company which employed him.

When not traveling, he spent long hours at work, leaving at 7:30 a.m. in the morning and returning home at 8:30

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p.m. and often later. When he worked overtime, about twice a week, he would arrive home at 11:00 p.m. or midnight. When he was home and particularly during the pregnancy of his wife, Mr. Omachi was helpful in performing household chores, cooking and entertaining.

(151) Shortly before undertaking his business trip to the United States and Mexico, Mr. Omachi had been reassigned by Asahi to a section that dealt with salt. He began to study salt and planned to visit Exportadora's salt plant in Mexico. In September 1987, Mr. Omachi traveled to the United States with Mr. Takeya, a member of the Asahi board of directors. Mr. Omachi expected to introduce Takeya to American business contacts for Asahi Chemical.

The arrangements for Mr. Omachi's travel from San Diego to Guerrero Negro to visit Exportadora's salt plant were made through Mr. Matsushita of Mitsubishi. As I have noted, Mitsubishi is 49 percent owner of Exportadora.

(152) At trial, the Plaintiffs and Defendant Exportadora offered the testimony of economic experts on the damage claims. The methodology employed by the two experts in arriving at their opinions on economic losses differed widely.

(153) Doctor Lowell Bassett qualified as Plaintiffs' expert economist. Upon comparison of interest rates on Japanese government bonds for the period of 1966 to 1990, Doctor Bassett found the interest rate over the period of time to average 7.08 percent. Wage increases over the same period, 1966 to 1990, he found to average 8.48 percent.

In Doctor Bassett's opinion, wages have increased in Japan slightly more than interest rates. Accordingly, in his opinion, comparison of interest rates with inflationary factors required that future economic loss should not be reduced to determine present cash value.

(154) Based on Doctor Bassett's research, including review of depositions and interviews with decedents' survivors, Doctor Bassett arrived at the opinion that each of the deceased would have contributed to their beneficiaries three and a half hours per week in non-market services, such as driving a car,

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making house repairs and performing maintenance.

(155) Doctor Bassett concluded, based on the information received from the survivors of Doctor Kodani and Doctor Sugimoto, that the information was not reliable enough to determine the consumption expenses of the deceased. He reconstructed consumption expense for each of the deceased based on information or data obtained through published materials not he average personal expenses in Japan. He then applied a formula on the increase in family personal expenses in the United States and taking into account increasing family size.

(156) Information furnished to Doctor Bassett by Mrs. Omachi appeared to be a sufficiently reliable basis to determine Mrs. Omachi's personal expenses. But when Doctor Bassett compared the information supplied by Mrs. Omachi with information obtained from Japanese published data, he found that the information provided by Mrs. Omachi averaged slightly less than the data based on the averages in Japan, and he opted to use the general average in making his calculations of Mr. Omachi's personal consumption.

(157) Doctor Bassett determined the earning capacity of each of the decedents based on historical data obtained from records of wages earned annually by decedents in the positions held by each up to the time of their deaths on September 30, 1987. To carry loss of income forward from September 30, 1987 until time of trial, Doctor Bassett calculated an average based upon the historical record of earnings and applied that average to determine economic loss to the time of trial.

(158) Since professors at Tottori University are required to retire at age 65, Doctor Bassett computed lost income caused by the death of Doctor Sugimoto and the loss of future income caused by the death of Doctor Kodani to age 65.

Based on his research and knowledge, Doctor Bassett formed the opinion that both professors would retire upon reaching the age of 65, but would undertake other work for an additional five years until reaching the age of 70. In his opinion, the earnings between first retirement and second

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retirement would be less and he fixed the amount of income to be earned in this period until second retirement at two thirds of earnings at the time of first retirement.

Although the widows of Doctor Kodani and Doctor Sugimoto knew little concerning their husbands' future plans beyond retirement from Tottori University, they reported to Doctor Bassett that their husbands planned to undertake some employment and he took this information into account in determining future economic loss.

(159) Doctor Bassett assumed Mr. Omachi would retire upon reaching the age of 62, although most Japanese employed by Japanese companies, according to published statistical data in Japan, retire between ages 55 to 60. In 1985, according to statistical data, approximately 95 percent of all Japanese industries had in place a mandatory retirement age between 55 years and 60 years. Doctor Bassett assumed that Japan's aging population, resulting in fewer young people in proportion to numbers of older persons, would cause the age of retirement from Japanese companies to rise to 62 in the future.

(160) Doctor Bassett obtained tables of life expectancy from publications in Japan and calculated a life expectancy:

...for Mr. Omachi of 35.74 years until age 77.47.

...for Doctor Kodani of 23.13 years until age 79.16.

...for Doctor Sugimoto of 18.73 years until age 80.3.

Relying on life expectancy tables, Doctor Bassett assumed that each of the wives would have outlived their husbands.

In determining family size, he included Mrs. Omachi's daughter who was born in 1988. He was also aware that Mrs. Sugimoto was now living with her son, but expressed doubt that Doctor Sugimoto was supporting the son.

Accordingly, Doctor Bassett computer an alternate determination excluding the son from the Sugimoto claims.

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(161) Doctor Bassett disclosed that his computation of five hours per week for care and guidance of Mr. Omachi's child born in 1988 was received from Plaintiffs' attorney, Mr. Foor, and based upon the attorney's instruction. He calculated the sum of $130,828 for lost care and guidance. He conceded that benefits based upon lost care and guidance are rarely applied.

(162) Doctor Bassett conceded that his calculations have been revised several times. He had also hoped to obtain information from the employers of the decedents, but that information was not forthcoming, so he was forced to compute averages based on historical data.

Doctor Bassett recognized that Japan is now in a recession and some economists believe that economic cycles, when taken into consideration with other economic factors, lead to more accurate results on economic losses. Doctor Bassett however believes that, in the long run, the long period is more reliable.

(163) Doctor Brodshatzer qualified as an expert economist and testified for Exportadora. In order to compute economic loss to the survivors of Doctor Sugimoto, Doctor Kodani and Mr. Omachi, Doctor Brodshatzer extensively reviewed publications containing statistical data having to do with Japanese economic and business conditions.

In Brodshatzer's opinion, Doctor Lowell Bassett has not evaluated the impact of retirement upon economic losses to the Plaintiffs from the deaths of Doctor Sugimoto, Doctor Kodani and Mr. Omachi.

Doctor Brodshatzer also expressed his opinions that Doctor Bassett had applied recognized economic methodology in an inconsistent manner and has failed to consider cyclical trends which necessarily bear on economic losses.

(164) Doctor Bassett stated his opinion that no discount factor should be applied to reduce future economic losses to present value. In the period from 1966 to 1990, comparison of interest rates in Japan averaged 7.08 percent for that period, and wage increases averaged out for the period at 8.48 percent. On

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the basis of this Japanese statistical data, Doctor Bassett reached an opinion that the discount factor amounted to zero.

(165) According to Doctor Brodshatzer, in the 15 years from 1966 to 1981, wage increases in Japan have exceeded interest rates, but in 1981 that trend was reversed and, since that date, interest rates have exceeded wage increase in Japan. Doctor Brodshatzer analyzed Japanese statistical data relating to interest rates and wage increases in the period 1966 to 1990. His approach, however, was to compare interest rates with wage increase in five-year increments. His calculations disclose:

In the period 1966 to 1970, interest rates rose at 7.02 percent, wage increases 9.82 percent and the difference was that wage increases rose 2.8 percent higher than interest rates.

In the period 1970 to 1975, interest rates rose at 7.81 percent, wage increases rose at 18.42 percent and the difference was that the wage increase in that five-year period rose 10.61 percent over interest rates.

In the period 1975 to 1980, interest rates rose at 8.04 percent, wage increase rose at 8.05 percent and the two rates of increase, wage and interest, were even.

In 1980 to 1985, interest rates rose at 7.75 percent, wage increase at 3.97 percent, and the interest rates exceeded wage increase by 3.78 percent.

In the period 1985 to 1990, interest rates rose 5.36 percent, wage increase rose 3.07 percent, and that period interest rates exceeded wage increases by 2.29 percent.

(166) In Doctor Brodshatzer's opinion, since the number of years to date of retirement would vary with each of the deceased, the remaining years of work life expectancy for each decedent would also vary.

Assuming that each decedent would be available for employment until the age of 70, the rate of discount to present cash value would vary as to each of the decedents.

(167) Doctor Brodshatzer based his determinations of lost income from the date of the fatal accident September 30, 1987 until the time of trial based on statistical data of professors' earnings in Japan and from the wage increases of

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companies employing more than 5,000 persons.

(168) Doctor Bassett and Doctor Brodshatzer differed as well in the method followed by each in determining consumption expense. Doctor Bassett's approach was to obtain statistical data from Japanese sources of personal expense and apply a formula based upon the number of family members to project personal consumption of each decedent.

After interviewing Mrs. Sugimoto and Mrs. Kodani, Doctor Bassett sought to obtain additional information in order to determine the personal consumption for Doctor Sugimoto and Doctor Kodani. When he was unable to obtain further information, he concluded the information available was unreliable and selected another method of computation. He was satisfied, however, that the records of household expenses maintained by Mrs. Omachi was sufficiently reliable to determine Mr. Omachi's consumption expense, but upon comparing results from the alternate method, he opted to apply the same method to determine Mr. Omachi's personal consumption as he employed in determining the personal consumption of Doctor Kodani and Doctor Sugimoto.

(169) Doctor Brodshatzer relied upon the information provided by Mrs. Sugimoto, Mrs. Kodani and Mrs. Omachi. He found the information was sufficiently reliable to determine personal consumption following this method. In support of his methodology in estimating personal consumption, he expressed a preference for using information exposed to examination by counsel. The information which he relied upon for the most part was found in the depositions of Mrs. Sugimoto, Mrs. Kodani and Mrs. Omachi, together with corrections made to their deposition testimony.

(170) Doctor Brodshatzer included pension payments as an offset to economic losses. Plaintiffs object on legal grounds under the collateral source doctrine and Doctor Bassett did not account for pension benefits in determining economic loss.

(171) I find that Doctor Brodshatzer's computations are more reliable than Doctor Bassett's. It is true that the period beginning in 1966 and ending in 1975 wages exceeded interest

rates. But beginning in 1981 and continuing until 1990, interest rates have increased more than wage rates have increased. The cyclical trend beginning in 1980 should be taken into account in order to make computations of economic loss more accurate, and reliable and future economic losses must be discounted to present cash value.

(172) I find that Doctor Bassett has not considered statistical data indicating that wages of older persons in Japan increase less rapidly than younger persons. Doctor Brodshatzer's computation of lost income from September 30, 1987 based on statistical data of the earnings of university professors in Japan, in computing economic losses for the decedents, Doctor Sugimoto and Doctor Kodani, and Brodshatzer's use of the wage increases of employees in companies employing more than 5,000 people and computing economic loss for the decedent, Omachi are more reliable.

I also find that the methodology applied by Doctor Bassett to determine the estimated personal consumption of decedents to be unreliable. Doctor Brodshatzer's estimates based on evidence provided by the family members of the decedents, I find to be more reliable.

(173) I find that Doctor Sugimoto on several occasion, because of his work, lived apart from his wife for as long as two years. He left her to care for his aging parents, a difficult duty since the parents required much attention.

I find as well that Doctor Sugimoto was sometimes as not as caring or pleasant to his wife and provided her with little company and companionship. I find Mrs. Sugimoto entitled to the sum of $20,000 per year for noneconomic losses reduced to present cash value.

(174) Doctor Kodani and Mr. Omachi were more caring and generous to their wives; however, both Doctor Kodani and Mr. Omachi were ambitious and driven by their efforts to obtain recognition and advancement in their work. Omachi in particular worked long hours, sometimes returning home at 11:00 p.m. or midnight.

I find Mrs. Kodani and Mrs. Omachi entitled to the sum

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of $25,000 per year for noneconomic damages reduced to present cash value.

CONCLUSIONS ON DAMAGES

(175) While I accept Doctor Brodshatzer's computations for past economic losses brought about by the deaths of Doctor Sugimoto, Doctor Kodani and Mr. Omachi, I conclude that reduction of economic loss by the amount of pension benefits which have been received by the survivors is a reduction of income received from a collateral source. Under California law, pension plan benefits are considered to come from a collateral source and should not be used to offset tort damages, Hume vs. Lacey, 112 Cal.App.2d 147 (1952).

(176) I conclude that Doctor Bassett's projection of retirement ages of decedents is largely unsupported by the evidence and is contrary to statistical data or information. Doctor Brodshatzer projected the initial retirement of Professor Sugimoto and Professor Kodani at 65, the mandatory retirement age of professors at Tottori University. He determined that Mr. Omachi would retire from Asahi Chemical at the age of 60.

I conclude that the evidence of future employment and compensation of the decedents beyond retirement to be so uncertain and indefinite that future economic loss cannot be estimated within any reasonable probability or amount.

(177) A claim is made on behalf of Eri Omachi, the daughter of decedent Omachi. Eri was born some months after the death of her father. The claim is supported on nothing more than instructions given by Plaintiffs' counsel, Mr. Foor to Doctor Bassett to include five hours per week of special services lost to Eri Omachi in computing damage estimates. I reject this claim as unsupported on the information presented at trial.

(178) In a recent air crash case, the Ninth Circuit Court of Appeals clarified the California law of damages in a wrongful death case, and I quote,

"In California, the wrongful death plaintiff may

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recover 'lost present and future economic support as well as the pecuniary (as opposed to sentimental) value of such factors as lost comfort, society, companionship, care and protection.' Notwithstanding the fact that it is the pecuniary value of lost society, comfort and care that is recovered in a wrongful death action, the California Supreme Court labeled these damages as non-pecuniary because they do not have an ascertainable economic value. To recover for the loss of society, comfort and care, however, the plaintiff must establish the pecuniary value of such loss and the amount is monetarily quantified. Under California law, the damages for wrongful death must be reduced to present value." In Re Air Crash Disaster Near Cerritos, California, 982 F.2d 1271 at 1278 (9th Cir. 1992).

(179) Neither party has presented evidence on the appropriate discount rate for noneconomic damages, and Plaintiffs seem to argue that the Court should not discount noneconomic damages at all.

As the Ninth Circuit ruled in Cerritos, noneconomic damages must be discounted to present value in California. The discount rate should reflect the rate of return over inflation an ordinary investor seeking reasonable security could realize, Fox vs. Pacific Southwest Airlines, 133 Cal.App.3d 565, 568, n. 2 and 570, n. 5 (1982).

(180) In calculating economic damages, Doctor Brodshatzer applied a three percent discount rate to future nonmarket services. I find that, for the purpose of selecting a proper discount rate, nonmarket services are analogous to noneconomic damages. I have discounted the noneconomic damages to present value using three percent as the proper discount rate.

(181) Mrs. Mayumi Nukiwa is Doctor Kodani's eldest

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daughter. I assume that Mrs. Nukiwa is an heir entitled to recover for the death of Doctor Kodani under California Code of Civil Procedure § 377. Ms. Nukiwa's claims of economic damages are by reason of increased telephone and travel expenses to console her mother and her grandmother and the loss of expected gifts from Doctor Kodani to Mrs. Nukiwa and her children. I find that these claims of economic loss are too speculative and tenuous.

(182) Mrs. Nukiwa claims noneconomic damages as well. Since her marriage in 1982, Doctor Kodani and Mrs. Nukiwa visited together only about twice a year. While I am sure she suffered considerable grief and sorrow at the loss of her father, their independent lives do not support a finding that she suffered a significant loss of care and companionship. See Krouse vs. Graham, 19 Cal.3d 59 (1977).

(183) Exportadora argues that this Court should apportion the award of noneconomic damages between Exportadora, Aviones, the government of Mexico, Cessna and Teledyne based upon the relative culpability of the parties. California law requires the apportionment of noneconomic damages in, quote,

> "...an action for... wrongful death, based upon principles of comparative fault." Cal. Civ. Code § 1431.2.

In Miller vs. Stouffer, 11 Cal.Rptr. 2d 454 (Cal.App. 1992), the California Court of Appeals ruled that Section 1431.2 did not apply to judgments based on vicarious liability.

Exportadora is liable not only for its own negligence but vicariously for the negligence of the pilot, Raul Gutierrez Tellez, based upon implied contract, non-delegable tort duty and ostensible agency theories. I find that Section 1431.2 is inapplicable to the present award.

(184) Plaintiffs contend without citing any authority that they are entitled to prejudgment interest on the award of damages. I conclude that, under California Civil Code § 3288,

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I have the discretion to award such interest and decline to do so in the present case. The damages were unliquidated until the time of judgment.

(185) For each of the three decedents, Sugimoto, Kodani and Omachi, Cessna settled for $25,000, Teledyne for $2,000 and Seguros Constitucion, the insurance agent for Aviones de Sonora, for $13,329.07. These total $40,329.07 for each Plaintiff or a total of $120,987.21 in total offsets. I find that these amounts should be offset against the awarded damages in this litigation.

COMPUTATION OF DAMAGES

(186) I find that the present value of the economic damage sustained by Mrs. Sugimoto is $342,175. I find that Mrs. Sugimoto's life expectancy is ten years from the date of trial. The trial occurred approximately five years and three months after the accident. I find that Mrs. Sugimoto's economic damages should be calculated for 15 years from the date of the accident. I find that Mrs. Sugimoto sustained a noneconomic loss of $20,000 per year. Reduced to present value, this annual loss results in noneconomic damages of $238,800. Mrs. Sugimoto's total damage amounts to $580,975.

(187) I find that the present value of the economic damage sustained by Mrs. Kodani is $604,239. I find that Mr. Kodani's life expectancy was 19 years from the date of the accident. I find that Mrs. Kodani sustained a noneconomic loss of $25,000 per year. Reduced to present value, this annual loss results in noneconomic damages of $358,000. Mrs. Kodani's total damage is $962,239.

(188) I find that the present value of the economic damages sustained by Mrs. Omachi is $1,435,222. I find that Mr. Omachi's life expectancy is 31 years from the date of the accident. I find that Mrs. Omachi sustained a noneconomic loss of $25,000 per year. Reduced to present value, this annual loss

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results in noneconomic damages of $500,000. Mrs. Omachi's total damage is $1,935,222.

(189) These economic damages which I now award should be reduced by the offsets received by each of the Plaintiffs and shall reduce the amounts awarded to each accordingly.

That concludes the findings and conclusions of my decision in this case.

(Proceedings concluded.)

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APPENDIX D

Opinion
Court Of Appeals
April 19, 1991

Before: William C. Canby, Jr. and Pamela Ann Rymer, Circuit Judges, and David F. Levi*, District Judge.

Opinion by Judge Rymer

SUMMARY

Sovereign Immunity/Conflict of Laws

Affirming a district court judgment denying dismissal of a wrongful death action, the court of appeals held that a foreign corporation was not immune from suit under the FSIA because the foreign entity was engaged in commercial activity having a substantial contact with the United States.

Appellant Exportadora de Sal, S.A. de C.V., is a Mexican corporation in which the Mexican government has a 51% ownership interest, and Mitsubishi Corporation of Japan owns the remainder. Exportadora maintained an office in San Diego, Calif., to communicate with outside parties on behalf of its plant in Mexico. Five relatives of the appellees traveled from San Diego to Exportadora's Mexican facility. Exportadora drove them from San Diego to the Tijuana airport and then flew them to Exportadora's plant on its own airplane. On the flight back, the plane crashed on United States territory near the Mexican border, killing all aboard. The district court denied Exportadora's motion to dismiss the action against it, claiming sovereign immunity under the Foreign Sovereign Immunities Act (FSIA). The district court also denied Exportadora's motion for partial summary judgment on the grounds that the laws of Mexico applied to this case.

[1] Congress has declared that foreign states shall be

*The Honorable David F. Levi, United States District Judge for the Eastern District of California, sitting by designation.

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immune from the jurisdiction of the courts in this country unless the "commercial activity" and the "noncommercial tort" exceptions apply. [2] The commercial activity exception of the FSIA requires two components for it to apply: that the foreign entity be engaged in commercial activity, and that the commercial activity have substantial contact with the United States. [3] A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity is determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose. [4] As such, the district court did not clearly err in finding that Exportadora arranged the transportation of the decedents to and from Mexico and transported them. Arranging transportation and transporting people is not an act that only a sovereign can perform. [5] Here, the Mexican government did not order Exportadora to assist it in carrying out a sovereign function. Instead, the Mexican government requested that Exportadora make its transportation link available. Exportadora's acquiescence in the request helped maintain goodwill with its majority stockholder, which is not an inherently public act. Thus, the district court correctly concluded that this transportation was commercial activity.

[6] A commercial acitivity carried on in the United States by a foreign state means commercial activity carried on by such state and having substantial contact with the United States. [7] The district court found that Exportadora maintained a regular air-and-auto link between its San Diego and Mexican offices as part of its commercial operations, that it arranged, through its San Diego offices, round-trip transportation for the decedents from San Diego to Mexico and that all five began their trips in San Diego. Given these findings, the district court correctly concluded that the relevant activity was the round trip. [8] The fact that the transportation was arranged through the San Diego office and the trip began in that city provided a sufficient nexus with the United States. [9] Because the court held that the FSIA's commercial excep-

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tion applied to Exportadora's claim of sovereign immunity, it did not need to address the other two statutory exceptions or the noncommercial tort exception.

[10] Because jurisdiction in this case was based on FSIA, not diversity of citizenship, federal common law applied to the choice of law rule determination. [11] Following the Second Restatement approach, California law applied since the injuries occurred in California, unless Mexico had a more significant relationship to the occurrence and the parties. [12] The court concluded that Mexico did not have a more significant relationship to this suit than California, the place of injury. While Mexico's policy limits the liability of its resident defendants in wrongful death actions, California's rule allowing full recovery serves the policies of providing full compensation for the survivors of its residents, and deterring wrongful conduct within its borders, said interest extending to all persons present within its borders. Although the district court followed the wrong path in deciding the choice of law issue, it correctly concluded that California law applied.

COUNSEL

John H. Stephens, Robbins & Keehn, San Diego, California, for the defendant-appellant.

Robin E. Foor, Belmont, California; Gerald C. Sterns, Sterns & Walker, San Francisco, California; Peter Nakahara, Nakahara & Hinoki, San Jose, California; Eugene Schneider, Oakland, California, for the plaintiffs-appellees.

OPINION

RYMER, Circuit Judge:

This is a consolidated appeal arising out of an airplane crash in San Diego, California as the plane approached an air-

port in Tijuana, Mexico. Exportadora de Sal, S.A. de C.V. ("Exportadora") challenges two rulings of the district court: (1) that Exportadora does not have sovereign immunity, and (2) that California law applies to these actions. We affirm.

I

Exportadora is a corporation which produces salt in Mexico. The Mexican government owns 51% of the corporation and the Mitsubishi Corporation of Japan owns the remainder. Exportadora maintained an office in San Diego, which communicated with outside parties on behalf of the Exportadora plant in Guerrero Negro, Mexico because the plant had no telephone service. In September 1987, five relatives of the plaintiffs traveled from San Diego to Exportadora's Guerrero Negro facility. Exportadora drove them from San Diego to the Tijuana airport and then flew them from there to Guerrero Negro on its own airplane. For the return trip, Exportadora's plane was unavailable. It chartered another plane from Aviones de Sonora, S.A., a Mexican corporation, to fly the travelers back from Guerrero Negro to Tijuana.

On that flight back, fog at Tijuana necessitated an instrument landing approach to the Tijuana airport. Such an approach requires an airplane to fly into United States airspace in order to land from the west. The plane failed to maintain a sufficient altitude and crashed short of the Tijuana airport, in United States territory near the Mexican border, killing all aboard. The plaintiffs in this action are the survivors of five travelers killed in the crash. Each group of survivors brought a separate action, two of them in state court. The state court actions were removed to federal court. *See* 28 U.S.C. § 1441(d) (removal of civil actions against foreign states).[1] Once all five actions were in federal court, the district court consolidated them.

[1]Exportadora is considered an "agency or instrumentality of a foreign state" under 28 U.S.C. § 1603(a) & 1603(b)(2), because Mexico owns a majority ownership interest in it.

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The five travelers made the trip to Guerrero Negro for different purposes. Ramon Schoenberg and Manuel Hernandez, both California residents, worked for a pump manufacturer and traveled to Guerrero Negro to solicit business. Hideo Omachi, a resident of Japan, was a purchasing agent for a Japanese company. Katsuo Sugimoto and Yoshihito Kodani, also residents of Japan, were representatives of Tottori University in Japan and were visiting an agricultural experiment in Guerrero Negro adjacent to Exportadora's salt production facility.

Exportadora moved to dismiss the suit, claiming sovereign immunity under the Foreign Sovereign Immunities Act (FSIA). The district court's denial of that motion was entered on July 7, 1989, and Exportadora timely appealed. As the action continued, Exportadora moved for partial summary judgment, claiming that the laws of Mexico apply to this case. The district court denied that motion, but granted permission to appeal pursuant to 28 U.S.C. § 1292(b), having determined that the choice of law issue "involves a controlling question of law as to which there is substantial ground for difference of opinion." This court granted permission to appeal the choice of law issue by order of January 18, 1990, and consolidated that appeal with Exportadora's appeal of the denial of its motion to dismiss.

II

We first consider whether Exportadora is immune from this lawsuit in United States courts, depriving the district court of jurisdiction. Because Exportadora made its motion to dismiss on the grounds that sovereign immunity applied, the denial of that motion is an appealable interlocutory order under the collateral order doctrine. *Compania Mexicana de Aviacion, S.A. v. United States Dist. Court*, 859 F.2d 1354, 1358 (9th Cir. 1988) (per curiam).

The existence of subject matter jurisdiction is a question of law reviewed de novo. *Kruso v. International Tel. & Tel.*

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Corp., 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, — U.S. —, 110 S. Ct. 3217, 110 L. Ed. 2d 664 (1990). We accept the district court's factual findings on jurisdictional issues unless they are clearly erroneous. *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989).

[1] Congress has declared that foreign states "shall be immune from the jurisdiction of the courts of the United States and of the States" unless an exception applies. 28 U.S.C. § 1604. The relevant exceptions to which plaintiffs point are the "commercial activity" and the "noncommercial tort" exceptions. "Once the plaintiff offers evidence that an FSIA exception to immunity applies, the party claiming immunity bears the burden of proving by a preponderance of the evidence that the exception does not apply." *Joseph v. Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1021 (9th Cir. 1987), *cert. denied*, 485 U.S. 905, 108 S. Ct. 1077, 99 L. Ed. 2d 236 (1988).

The commercial activity exception of the FSIA provides that a foreign state is not immune from suit in any case

> [1] in which the action is based upon a commercial activity carried on in the United States by the foreign state;
>
> [2] or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere;
>
> [3] or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). If the commercial activity exception does not apply, we then look to the noncommercial tort exception. 28 U.S.C. § 1605(a)(5).

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Our analysis begins with the first clause of the commercial activity exception, which the district court concluded controls the immunity claim in this case. If we conclude that plaintiffs based their action on commercial activity of Exportadora in the United States in transporting decedents on the ill-fated flight, there is no immunity.

[2] The FSIA requires two components for this exception to apply: (1) that the foreign entity be engaged in commercial activity, and (2) that that commercial activity have "substantial contact with the United States." 28 U.S.C. § 1603(e); *see Compania Mexicana*, 859 F.2d at 1360 (must be a "significant 'nexus' " between cause of action and commercial activity). A. Commercial Activity

[3] "A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d); *see Joseph*, 830 F.2d at 1023; *see generally International Ass'n of Machinists and Aerospace Workers v. OPEC*, 649 F.2d 1354, 1357 n.6 (9th Cir. 1981) (discussing nature and purpose), *cert. denied*, 454 U.S. 1163, 102 S. Ct. 1036, 71 L. Ed. 2d 319 (1982).. The district court concluded that transporting people to and from Exportadora's plant, by its nature, constituted commercial activity.

In our review of that conclusion, we must focus on what is the *nature* of a corporation's transporting people from one place to another. "An activity is public and 'noncommercial' if it is one which only a sovereign state can perform." *Joseph*, 830 F.2d at 1024. But it is commercial if it "is of the type an individual would customarily carry on for profit." *Letelier v. Republic of Chile*, 748 F.2d 790, 797 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125, 105 S. Ct. 2656, 86 L. Ed. 2d 273 (1985).

[4] The district court did not clearly err in finding that Exportadora arranged the transportation of the decedents to and from Guerrero Negro and transported them. Arranging transportation and transporting people is not an act that "only a sovereign can perform." Exportadora engaged in commercial activity in arranging transportation for its prospective business partners, Schoenberg, Hernandez and Omachi; bringing them to Guerrero Negro facilitated potential commercial dealings. As for the university representatives, Sugimoto and Kodani, Exportadora arranged transportation for them at the behest of its majority stockholder, the Mexican government. Appeasing one's majority stockholder is an activity that a private entity can perform and benefits future commercial dealings in other contexts by maintaining goodwill. Exportadora has failed to show why such an act is not commercial in nature.

Exportadora's contention that the transportation of Sugimoto and Kodani, the university representatives, was public in nature and therefore sovereign activity is unpersuasive. Exportadora argues that the agricultural experiment site, for which Sugimoto and Kodani were bound, constituted public activity—namely, government-sponsored research. It analogizes to *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980). In that case, two vacationers flew from the United States to the Dominican Republic via Dominicana, the wholly government-owned airline of the destination country. Upon arrival in the Dominican Republic, however, the Arangos were denied entry as "undesirable aliens" and the Dominican government ordered the airline to fly them out of the country. The Arangos sued, claiming damages from the inconvenience of their return-trip odyssey. *Id.* at 1373. The Fifth Circuit held that sovereign immunity applied to Dominicana, because the government "impressed" it into service to carry out a sovereign function, enforcing immigration laws. *Id.* at 1379.

[5] *Arango* is distinguishable. Here, the Mexican government did not order Exportadora to assist it in carrying out a

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sovereign function, as the Dominican government had in *Arango*. Instead, the Mexican government requested that Exportadora make its transportation link available. There was no impressment here. The fact that Sugimoto and Kodani had a public "purpose" at their destination is irrelevant; the inquiry is into the nature of the activity, not its purpose. 28 U.S.C. § 1603(d). The activity was transportation, which Exportadora undertook to appease its majority stockholder. Exportadora's acquiescence in the request helped maintain goodwill with its majority stockholder, which is not an inherently public act. The district court correctly concluded that this transportation was commercial activity. B. Substantial Contact with the United States

[6] "A 'commercial activity carried on in the United States by a foreign state' means commercial activity carried on by such state and having substantial contact with the United States." 28 U.S.C. § 1603(e).

Exportadora, defining the relevant activity as the Guerrero Negro-to-Tijuana return air segment, argues that there is no significant nexus with the United States. Plaintiffs, on the other hand, define the activity as round-trip transportation from and to San Diego. Defining the scope of the relevant conduct takes us far in determining the result. *See Machinists and Aerospace Workers*, 649 F.2d at 1357 ("A critical step in characterizing the nature of a given activity is defining exactly what that activity is. The immunity question may be determined by how broadly or narrowly that activity is defined.").

[7] The district court found that Exportadora maintained a regular air-and-auto link between its San Diego and Guerrero Negro offices as part of its commercial operations, that it arranged, through its San Diego office,[2] round-trip transpor-

[2]Exportadora claims that the decision to approve the trip could only have been made at Guerrero Negro and that the San Diego office was merely a conduit for communicating the decision. That contention is immaterial; the San Diego office was involved in arranging the trip, no matter where the decisions were made.

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tation for the decedents from San Diego to Guerrero Negro and that all five decedents began their trips to Guerrero Negro in San Diego. These findings of fact are not clearly erroneous. Given these findings, the district court correctly concluded that the relevant activity was the round trip. The decedents did not make arrangements for legs of the trip separately. They made round-trip arrangements through the San Diego office at the outset, so we consider the arranged travel as a whole.

[8] Thus framed, this case is similar to *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270 (3d Cir. 1980). In that case, involving a tort in Mexico allegedly committed against an American passenger, the Third Circuit held that a government-owned airline was subject to federal court jurisdiction because the passenger bought his ticket in the United States and began his round trip there. Those facts constituted commercial activity in the United States. Similarly, in this case, decedents arranged their round-trip in the United States for departure from and return to the United States. The fact that the transportation was arranged through the San Diego office and the trip began in that city provides a sufficient nexus with the United States. *See id.* at 273; *Barkanic v. General Admin. of Civil Aviation of the Peoples Republic of China*, 822 F.2d 11, 13-14 (2d Cir.), *cert. denied*, 484 U.S. 964, 108 S. Ct. 453, 98 L. Ed. 2d 393 (1987) (travel in China arranged in United States).

Exportadora slices the San Diego-Guerrero Negro journey in segments, arguing that the San Diego-Tijuana leg, and therefore its activity in the United States, ended when its van crossed the border into Mexico en route to the Tijuana airport for the outbound journey to Guerrero Negro. In support, Exportadora relies on *Compania Mexicana de Aviacion, S.A. v. United States Dist. Court*, 859 F.2d 1354 (9th Cir. 1988) (per curiam), which involved an airplane crash of a flight wholly within Mexico. In that case, plaintiffs' decedents traveled on tickets obtained in Mexico for a voyage within Mex-

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ico, but plaintiffs tried to invoke the commercial activities exception because the plane had been serviced in Chicago the day before the accident and the flight was scheduled to terminate eventually in Los Angeles after two stops in Mexico. We rejected the argument, holding that the only relevant act in the United States—the servicing—did not provide a significant nexus with the lawsuit. *Id.* at 1360. In this case, though, the fact that the trip was arranged in the United States to begin in and return to the United States provides the necessary nexus.

[9] Because we hold that the first clause of the commercial activity exception applies, precluding sovereign immunity in this case, we need not address the other two clauses of § 1605(a)(2) or the noncommercial tort exception in § 1605(a)(5).[3]

III

Exportadora also contends that the district court erred in concluding that California law applies to these actions. Jurisdiction to review the district court's choice of law determination rests on 28 U.S.C. 1292(b). The district court's choice of law decision is reviewed de novo. *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1001 (9th Cir. 1987).

[3]Exportadora also claims that its responsibility for the safety of the five travelers ended when its plane was unavailable for the return flight to Tijuana and it instead chartered another aircraft. This contention goes to the merits of plaintiff's tort claims, not to the subject matter jurisdiction question of immunity. Whether Exportadora, having arranged for round-trip transportation to the United States, retained a duty to the travelers to transport them safely, or whether Exportadora is vicariously liable for alleged negligence of the charter pilot, are ultimately questions of tort liability. We express no view as to whether Exportadora ought ultimately to prevail on its tort defenses before the district court. At this point, we consider only the jurisdictional claim and Exportadora's tort arguments are not relevant to that inquiry.

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The choice of law inquiry has two levels. First, we must determine whose choice of law rules govern. Second, applying those rules, we determine whose law applies. On the first level, either California or federal common law choice of law rules control. On the second level, Exportadora claims that Mexican law, which limits damages, should apply, while plaintiffs argue for the application of California law, which does not limit recovery.

A. Whose Choice of Law Rules Apply?

[10] The parties did not dispute before the district court that California's choice of law rules would apply to this action. Their position was incorrect. Although the general rule is "that a federal court sitting in diversity applies the conflict-of-law rules of the state in which it sits," *Harris*, 820 F.2d at 1002 (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S. Ct. 1020, 1021, 85 L. Ed. 1477 (1941)), jurisdiction in this case is based on FSIA, not diversity. *Id.* Therefore, federal common law applies to the choice of law rule determination. *Id.* at 1003; *Liu v. Republic of China*, 892 F.2d 1419, 1425-26 (9th Cir. 1989) (analyzing doctrine of respondeat superior to determine if jurisdictional immunity exception applied), *cert. dismissed*, _ U.S. _, 111 S. Ct. 27, 111 L. Ed. 2d 840 (1990). Federal common law follows the approach of the Restatement (Second) of Conflict of Laws (1969). *Harris*, 820 F.2d at 1003-04.

Exportadora claims that it is too late to contend that the federal common law rule applies because plaintiffs did not so argue before the district court, citing the general rule that a court of appeals does not consider for the first time an issue not raised in the trial court. *See Union Pac. R.R. v. Johnson*, 249 F.2d 674, 677 (9th Cir. 1957). That argument fails, though, because the relevant issue is whose law applies, and Exportadora itself raised that. The question of whose rules apply in *deciding* whose law applies is predicate to the ultimate decision. Because the ultimate *issue*—whose law

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applies—was raised in the district court, this court, in exercising our de novo review on that ultimate issue, must evaluate whatever steps are necessary to decide the issue.

B. Whose Law Applies?

[11] Following the Second Restatement approach, there is "a presumption that the law of the place where the injury occurred applies." *Harris*, 820 F.2d at 1003-04. The relevant Restatement section provides:

> In an action for wrongful death, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Restatement (Second) of Conflict of Laws § 175 (1969) (quoted in *Harris*, 820 F.2d at 1004 n.3). In this case, the injuries occurred in California, where the plane crash occurred. Under the Second Restatement approach, California law should apply unless Mexico has "a more significant relationship . . . to the occurrence and the parties." *Id.*

[12] Factors to consider in the "more significant relationship" test include:

> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

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(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Id. at § 6(2) (quoted in *Harris*, 820 F.2d at 1004 n.4).[4] Applying these factors, we conclude that Mexico does not have a more significant relationship to this suit than California, the place of injury. Mexico's policy is to limit the liability of its resident defendants in wrongful death actions. *Hurtado v. Superior Court*, 11 Cal. 3d 574, 583, 522 P.2d 666, 671, 114 Cal. Rptr. 106, 111 (1974). California's rule allowing full recovery serves two policies: (1) providing full compensation for the survivors of its residents, *id.* at 584, 522 P.2d at 672, 114 Cal. Rptr. at 112, and (2) deterring wrongful conduct within its borders, "said interest extending to *all* persons present within its borders." *Id.* (emphasis added).[5] Given those competing policies, we cannot say that Mexico has a more significant relationship to this litigation. Applying California law in this case "furthers the choice-of-law values of certainty, predictability and uniformity of result and . . . ease in the determination and application of the applicable law." Restatement (Second) of Conflict of Laws § 175 comment d;

[4]This list is not exclusive. Restatement (Second) of Conflict of Laws § 6 comment c.

[5]"It is also abundantly clear that a cause of action for wrongful death without any limitation as to the amount of recoverable damages strengthens the deterrent aspect of the civil sanction: 'the sting of unlimited recovery . . . more effectively penalize[s] the culpable defendant and deter[s] it and others similarly situated from such future conduct.' " *Hurtado*, 11 Cal. 3d at 584, 522 P.2d at 672, 114 Cal. Rptr. at 112 (quoting Seidelson, *The Wrongful Death Action*, 10 Duq. L. Rev. 525, 528 n.12 (1972)).

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see Harris, 820 F.2d at 1004 (applying law of place of injury, under Second Restatement analysis, in suit arising out of airplane crash).[6] The district court's determination that California law applies is affirmed.

IV

The district court correctly determined that sovereign immunity does not apply to the defendants in this case. Although it followed the wrong path in deciding the choice of law issue, it correctly concluded that California law applies.

AFFIRMED.

[6]This case is not one of "those relatively rare situations where, with respect to the particular issue, the state of injury bears little relation to the occurrence and the parties." Restatement (Second) of Conflict of Laws § 175 comment d. California's interests and policies in protecting the safety of its airspace and in providing full compensation to its residents are implicated.

APPENDIX E

Statutory Provision Involved -
Relevant Excerpts From The Foreign
Sovereign Immunities Act

STATUTORY PROVISION INVOLVED

The instant petition raises important issues regarding the application of the Foreign Sovereign Immunities Act ("FSIA") (28 U.S.C. § 1602 et seq.), and the interpretation of a statutory exception to the immunities created by that Act. EXPORTADORA DE SAL, S.A. DE C.V. ("EXPORTADORA") is a Mexican corporation, owned in majority part by the Government of the United States of Mexico. Consequently, EXPORTADORA is a "foreign state" for the purposes of the FSIA.

> (a) A "foreign state," except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity -
>
> ...
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof ...

28 U.S.C. § 1603.

Because EXPORTADORA is a "foreign state" for the purposes of the FSIA, it is presumptively immune from the jurisdiction of the United States courts.

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the

United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1604.

However, jurisdiction was found to exist over EXPORTADORA in this case under the first clause of the "commercial activities" exception to the FSIA.

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case -

...

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state...

28 U.S.C. § 1605.

"Commercial activity" is defined by the FSIA as follows:

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1603.